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SANCTIONS IMPOSABLE FOR VIOLATIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE

by Professors Robert E. Rodes, Jr., Kenneth F. Ripple,
and Carol Mooney

A Report to the Federal Judicial Center from the
Thomas J. and Alberta White Center for Law, Government and
Human Rights, Notre Dame Law School

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This publication is a product of a study undertaken in furtherance of the Federal Judicial Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the authors. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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I. INTRODUCTION

Purpose

This paper surveys the current state of the law with respect to sanctions for violations of the Federal Rules of Civil Procedure as reported in both the case law and the secondary literature. After consultation with the Federal Judicial Center, we decided to focus our analysis on litigation behavior that results in the imposition of sanctions and the factors considered important by federal courts in determining which sanctions to apply. We trust that this approach will be the most helpful in determining the direction of future research or possible changes in the rules.

Methodology

This report was completed prior to the 1980 amendments to rules 26 and 37.

Case Law

First, we gathered citations for cases involving rules 11, 16, 36, 37, 41(b), and 55 from the United States Code Annotated (U.S.C.A.). We then read and briefed all court of appeals cases under these rules which were reported in the Federal Reporter and annotated as of February 1, 1979. We then returned to the district court cases and decided to review only the 1978 and 1979 cases annotated in the U.S.C.A. cumulative annual pocket. We limited our reading to these years so that we would review only current practice and so that we could make the best use of a limited amount of time.

In order to review the most recent cases, we also checked citations in the Federal Rules of Civil Procedure tables which update the Wright and Miller treatise, Federal Practice and Procedure, and those which appear in the front of the advance sheets for the Supreme Court Reporter, Federal Reporter, Federal Supplement, and Federal Rules Decisions. We read and briefed all district court and court of appeals decisions that were listed under the pertinent rules in the advance sheets, beginning with the last volume and page included in the 1979 U.S.C.A. pocket part and ending with the advance sheets published July 30, 1979.

Local Rules

We examined all local rules printed in the Federal Rules Service looseleaf volumes as of June 1, 1979. We read and briefed relevant citations from the U.S.C.A. Annotations to Rule 83.

Secondary Literature

We surveyed all secondary literature catalogued in the Index to Legal Periodicals from the date of the original promulgation of the rules in 1938 to July 31, 1979. We also examined the major legal treatises and relevant annotations.

Inherent Limitations

The case analysis method limited our research in a number of ways. For instance, because judicial opinions provided our main source of data, we were limited to the judges' accounts of the facts. No doubt federal judges accurately report facts in their opinions, but they can and often do present these facts in a fashion designed to support their decisions. The selective presentation of facts became especially clear whenever we compared the statement of facts in a district court opinion with the statement in a court of appeals opinion reversing the district court. Therefore, by using the case analysis method, we limited our ability to study the facts of each case from a purely objective standpoint.

The case analysis method also does not produce accurate statistical data concerning the frequency with which courts apply sanctions or the prevalence of particular considerations. The majority of court of appeals cases involve the "drastic sanctions" of dismissal with prejudice or default judgment for breach of the rules of procedure. These two sanctions are considered "final orders" and appealable. The "lesser sanctions" of designating facts as established for purposes of the litigation, precluding the introduction of evidence, forbidding the disobedient party to assert the claims or defenses, or imposing expenses caused by the violation of a rule or order are not final orders and hence are unappealable. Unless a lesser sanction determines the outcome of a case, or is a collateral issue on appeal from an adverse judgment or the subject of mandamus proceedings, it is not reviewed by an appellate court. Because decisions do not generally discuss lesser sanctions, our case analysis method may not accurately reflect the actual proportion of drastic sanctions to lesser sanctions. In addition, because both types of sanctions may go unreported, the cases may give an inaccurate picture of how often sanctions are imposed.

We do not attempt a statistical analysis of judicial behavior in this report. Rather, we examine the large body of reported cases for an indication of the general practices of federal courts in imposing sanctions.

There are, of course, constant developments in this area. During the editorial process, significant additions in the case law and secondary materials were incorporated whenever possible.

II. RULE 37

The Structure of Rule 37

Rule 37[1] acknowledges that pretrial discovery operates for the most part outside the judicial system. "A court becomes involved only when a dispute arises between counsel and a motion for a protective order or a request to compel discovery or for sanctions is brought."[2] The rule outlines a series of sanctions, graduated in severity, and distinguishes between misconduct which consists of an inadequate response to a discovery request and misconduct which consists of totally ignoring a discovery request.[3] It provides a two-step process for imposing sanctions for inadequate response and a one-step process for imposing sanctions for ignoring a request.

Sanctions for Inadequate Response

A motion to compel discovery initiates the two-step process under rule 37(a). This process is the only recourse available to a party seeking discovery through depositions, interrogatories, or inspections where there has been a response to the discovery request, but the response is inadequate or inappropriate.[4] If the court grants the motion to compel, the person whose conduct necessitated the motion, or his attorney, must pay "the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified, or that other circumstances make the award of expenses unjust."[5] Payment of these expenses is the only sanction available when the misconduct is limited to the "failures"[6] enumerated in rule 37(a).

If the court enters an order compelling discovery under rule 37(a) and the order is disobeyed, the second step of the two-step process may be invoked under rule 37(b). The range of sanctions under rule 37(b)[7] for noncompliance with an order to compel discovery includes:

1) an order designating matters or facts as established for purposes of the litigation[8]

2) an order precluding a party from supporting or opposing certain claims or defenses

3) an order precluding the introduction of designated matters into evidence[9]

4) an order striking pleadings or dismissing the action or rendering a default judgment[10]

5) in lieu of or in addition to any of the foregoing, treating as a contempt any failure to obey any orders, except those to submit to a physical or mental examination[11]

6) any other such "orders in regard to the failure as are just."[12]

The court has discretion to decide which of these sanctions, if any, to impose in a particular case.[13]

The court must require that the disobedient party or his attorney pay the reasonable expenses, including attorneys' fees, caused by the failure[14] unless the court finds that the failure was substantially justified or that other circumstances make imposing expenses unjust.[15] This provision and the similarly worded provision of rule 37(a)(4) are intended to discourage parties from opposing discovery requests without justification.[16]

Sanctions for Ignoring a Request

Rule 37(d) allows a one-step sanction process when a party totally ignores discovery efforts by failing to appear for a deposition, failing to serve answers or objections to interrogatories, or failing to serve a written response to a request for inspection. Under those circumstances, "sanctions may be imposed as if the party had disobeyed a court order."[17] The court may employ the full gamut of sanctions provided for in rule 37(b), except for the contempt sanction, without a prior motion to compel.[18]

Sanctions Against Non-Party Witnesses

Rule 37(b)(2) and rule 37(d) both provide for treating "an officer, director, or managing agent of a party" in the same way as the party. A non-party witness who is not an officer, director, or managing agent is not subject to any discovery except deposition under rules 30 or 31. To depose a non-party witness, a subpoena must be obtained under rule 45. Disobeyance of a rule 45 subpoena may be treated as a contempt of court under rule 45(f).

A non-party witness who attends a deposition but does not answer one or more questions may be subject to a motion to compel under rule 37(a). If he fails to comply, he may be held in contempt under rule 37(b)(1). Contempt is the only sanction available against a non-party witness. Obviously, it would be futile to try to coerce such a witness with sanctions which only affect the outcome of the litigation.

Miscellaneous Sanctions

For an unjustified denial of a rule 36 request to admit, rule 36 permits the imposition of costs, via rule 37(c), incurred in proving the fact that was wrongfully denied.[19] Rule 37 also authorizes the issuance of subpoenas to persons abroad, and excludes the United States from penalties involving expenses and attorneys' fees.[20]

Current Operation of Rule 37

Inadequate or Inappropriate Responses to the Discovery Request

When a party has not totally ignored discovery requests but has made some response, an order compelling discovery must precede the imposition of sanctions under rule 37(b).[21] However, because the court's intention is to move a case to conclusion, the court favors discovery over sanctions. Even after such an initial order compelling discovery has been issued, a court often will deny a motion for sanctions and again order compliance with the discovery request.[22] Appeals courts normally uphold a decision not to impose sanctions as within the discretion of the trial judge.[23]

In dicta, the Supreme Court in Societe Internationale v. Rogers[24] indicated that the procedures of rule 37 (a 37(a) motion followed by a 37(b) motion and sanction) should be the exclusive remedy for inadequate responses to discovery requests, rather than rule 41(b) which provides for dismissal upon failure to obey a court order.[25] From what can be gathered from the reported cases, the dicta have had some effect on the judicial treatment of misconduct in this area; several opinions have reversed the imposition of sanctions on the ground that the rule 37 procedures were not followed.[26]

Refusal to be sworn or to answer questions at a deposition. When a party refuses to answer a question at his deposition, a rule 37(a) motion and order must be made before the court applies a sanction. The reported cases indicate that rule 37(a) procedure must also be followed when a party has appeared for a deposition but refused to be sworn or to answer any questions at all. The court cannot treat refusal to be sworn or answer any questions as if the party had not appeared,[27] and therefore cannot follow rule 37(d) procedure.

While "second chances" seem to be the norm, continued refusal to answer questions or continued evasive and obstructive tactics after a court order to answer has been issued will probably result in the imposition of a sanction. Generally, if a trial court imposes a sanction for continued refusal or obstruction, it will be either a dismissal or default judgment.[28] We found only three cases in which trial courts imposed lesser sanctions for such disobedience and two of those decisions were reversed on appeal.[29] A decision by a trial court not to impose any sanction will usually be upheld; but in one case, the court of appeals found that failure to impose a sanction was error because the party seeking response was unfairly prejudiced by not receiving it.[30]

According to the reported opinions, courts seldom impose expenses and costs caused by failure to answer or other misconduct at a deposition. We found only three cases in which expenses were imposed for failure to answer, and in one of those, the award was reversed on appeal because a motion to compel answers was not secured before the fine was imposed.[31]

Failure to comply with a court order to answer interrogatories. Courts apply lesser sanctions more frequently in dealing with failures to comply with court orders for fuller answers to interrogatories than in dealing with failure to comply with court orders for fuller answers to questions at depositions. When a party fails to comply with a court order to answer interrogatories, courts impose expenses caused by the failure more often than with any other misconduct.[32] We also found two cases in which a trial court cited either a party[33] or both a party and his attorney for contempt[34] for failure to comply with an order to answer interrogatories and seven cases in which a trial court ordered facts or allegations deemed established for purposes of the litigation.[35] In five of the latter cases, however, the result was as harsh as a more drastic sanction, since the facts or allegations deemed established determined the substantive issues. In another of the seven cases, Alliance to End

Repression v. Rochford,[36] the trial court ordered that certain allegations be deemed established prima facie and then shifted the burden of proof on the issues to the offending party. This is a novel approach, arguably within rule 37 if one combines 37(b)(2)(A) with the court's latitude to make "such orders in regard to the failure as are just."[37]

In general, trial courts treat evasive or incomplete answers to interrogatories the same as failures or refusals to answer.[38] Under rule 37(a)(3), both are considered failures to answer and both generally result in the imposition of dismissal and default rather than lesser sanctions.

As in other areas, the cases hold that the choice of sanction is within the discretion of the trial judge, and the standard for review of that choice is abuse of discretion.[39] Consequently, the decisions depend on the specific facts of the cases, and the courts of appeals usually express reluctance to overturn the imposition of a sanction. Nevertheless, the courts of appeals have been receptive to reasonable excuses as grounds for overturning harsh sanctions for failure to comply with court orders to answer interrogatories.[40] The factors upon which such reversals are based include:

1) the party was unable to respond because records were not kept[41]

2) the interrogatories were extensive and requested irrelevant information[42]

3) fires destroyed the records[43]

4) the party requesting the information was acting in bad faith[44]

5) a hearing on the willfulness of the disobedient party was not held[45]

6) a substantial claim of constitutional privilege requires inquiry into whether the information goes to the heart of the matter and whether it can be obtained elsewhere[46]

7) the responsibility of counsel was not assessed.[47]

Failure to comply with a court order to produce documents or allow inspection. Like failure to answer a question at a deposition or failure to answer an interrogatory, failure to produce or allow inspection of documents or other items (as opposed to failure to respond to a request to produce them) will result in the imposition of a sanction only after a rule 37(a) motion and order.[48] If the order is not obeyed, courts will usually give a warning before imposing sanctions. We found only three instances in which the disobedient party was not given an opportunity to comply with a court order to produce.[49] In all the other reported cases, before imposing a sanction the trial court issued at least one and usually several orders for production or inspection.[50]

Often, the failure to produce documents is coupled with other infractions of the rules. The additional infractions contribute to the decision to impose sanctions.[51] Nevertheless, failure to comply with a court order to produce documents, standing alone, has been held sufficient grounds for the imposition of a sanction,[52] especially if the disobedience involves total nonproduction.[53] Sanctions have also been imposed when the responses to the court order were evasive[54] or when the material was produced in such a condition as to be of little worth to the requesting party.[55]

The use of lesser sanctions for failure to comply with a court order to produce documents or items does not often appear in the reported cases. We found eight cases in which trial courts imposed expenses on a party,[56] five in which a party or attorney was held in contempt,[57] eight in which preclusion orders were imposed,[58] and two in which there were orders deeming facts or matters established for purposes of the litigation.[59]

The drastic sanctions of dismissal and default judgment appear more frequently than lesser sanctions. We found thirteen cases in which a trial court dismissed all or part of a claim for failure to comply with a court order to produce documents or items for inspection,[60] and ten instances of default judgment.[61] These findings suggest that drastic sanctions are preferred over lesser sanctions. We cannot be sure, of course, whether judges actually prefer the drastic sanctions, or whether the drastic sanctions are simply more apt to be reported. If judges do prefer dismissal or default judgments, perhaps it is because they find the failure to comply with a direct order to produce to be a sufficiently serious affront to the court's authority and the rights of the requesting party to justify drastic sanctions.

Generally, courts of appeals uphold the imposition of sanctions for misconduct in this area[62] unless they find abuse of discretion.[63] Factors important to the decisions to reverse include but are not limited to:

1) good faith of the party not complying with the court order[64]

2) no showing of prejudice to the complaining party[65]

3) possession of the item by a third party[66]

4) information sought was not otherwise discoverable in a criminal trial and discovery should have been postponed[67]

5) the trial court went outside the record[68]

6) the party was not given an opportunity to purge the contempt[69]

7) rule 37 does not authorize imposition of expenses on a non-party.[70]

The concept that the harsh sanctions should be applied only in cases of willful or serious misconduct and the fact that lesser sanctions are available may lead a court of appeals to review closely the imposition of a drastic sanction for failure to comply with a court order to produce.[71]

Totally Ignoring Discovery Requests

Failure to appear for a deposition. If a party is given proper notice to appear for a deposition, he must either appear at the appointed place and time, or object and move for a protective order under rule 26. Failure to appear for a deposition is sanctionable under rule 37(d) without a prior motion to compel attendance. The full gamut of sanctions under rule 37(b), except for contempt, is available to a court.[72]

A party may avoid a rule 37(d) sanction by merely appearing, even though he refuses to be sworn or to answer questions.[73] The requesting party must then move for an order compelling testimony pursuant to rule 37(a).[74] There is no requirement that a sanction be imposed for failure to appear for a deposition; district courts possess wide discretion.

Although some cases have upheld the imposition of immediate sanctions[75] because failure to appear for a deposition seriously obstructs the discovery process, district courts usually give a party at least one and sometimes several chances to appear.[76] These "second chances" are usually in the form of an order to appear and testify, often accompanied by a warning that failure to comply will result in a sanction.[77] The reported cases do not clearly indicate why these second chances are given, but the leniency may be attributable to the policy of deciding cases on the merits rather than disposing of them on procedural grounds. In addition, because failure to appear at a deposition is not as direct an affront to a court's authority as violation of a court order, courts may feel more comfortable imposing lesser sanctions.

Even after a district court decides to impose a sanction, the court of appeals may reverse. In at least three circuits, the court of appeals generally insists on a "second chance" for any party offering a plausible excuse for failure to appear or to produce a witness for a deposition. Acceptable excuses include: illness of the witness;[78] failure of counsel to notify the party of the deposition;[79] unavailability of the witness despite good faith efforts to find him;[80] difficulties imposed by long-distance travel;[81] and ineptitude of a pro se plaintiff.[82] In addition, the fact that the witness is ready to be deposed at a later date may contribute to leniency.[83]

The leniency displayed by courts in giving second chances does not carry over to the choice of sanctions for failure to appear for depositions; judges usually choose the drastic sanctions of dismissal or default judgment. The lesser sanctions--deeming facts established in accordance with the claim of the party requesting the deposition, forbidding the offending party to support or oppose designated claims or defenses or to introduce designated matters into evidence, and ordering the payment of expenses, including attorneys' fees, caused by the failure--are rarely applied to this category of misconduct.[84] In addition, the courts have not been creative in making other "such orders in regard to the failure as are just."[85]

There are several possible explanations for this phenomenon. One is that failure to appear for a deposition clearly demonstrates an unwillingness to proceed with the litigation. If a party does not appear for a deposition or make timely objections, he demonstrates lack of interest in pursuing his claims, ignorance of the rules of procedure, or contumacious and dilatory tactics. Neither the court nor the opposing party should be required to tolerate such conduct, and therefore drastic sanctions are warranted. Another explanation for choosing drastic sanctions may be that it is impractical to impose some of the lesser sanctions in this context. It would be difficult to order certain facts established in accordance with the requesting party's claim when no questions have been asked to indicate which facts should be deemed established. The court would encounter the same problem in deciding which claims or defenses the disobedient party should be prevented from supporting or opposing, or which facts he should be prevented from introducing in evidence. Because the scope of a deposition may encompass an entire case, ordering all the facts or matters established in accordance with the claims or defenses of the requesting party can have the same ultimate effect as a dismissal or default judgment. A summary judgment inevitably follows.[86] The same would be true of an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters into evidence.[87]

Ordering a disobedient party or his attorney to pay the expenses caused by failure to appear or to produce a witness for a deposition is not a common practice among federal courts, even though rule 37(d) specifically states that payment of expenses shall be required in lieu of or in addition to any of the other drastic or lesser sanctions unless the failure was substantially justified or other circumstances make an award of expenses unjust.[88]

Not answering or objecting to interrogatories. Rule 37(d) provides that failure "to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories," may subject a party to immediate sanctions without a prior motion to compel answers. The court may use the same sanctions available for failure to appear at a deposition.[89]

Because federal courts consider failure to respond to interrogatories a serious breach of the discovery process, they generally apply drastic sanctions.[90] However, if a party can demonstrate that his failure was not due to a lack of good faith or callous disregard of his responsibilities, then a court of appeals may consider a drastic sanction too harsh. In cases in which an attorney has died or has been ill,[91] or in which counsel has made a good faith effort to secure information in order to respond to all interrogatories, dismissal has been held to be too harsh a sanction.[92] The fact that the party subsequently became prepared to answer or that there was no indication of willful disobedience, gross indifference, or deliberate callousness has militated against the imposition of a sanction.[93] In addition, if the party propounding the interrogatories waits until late in the pretrial stage of the litigation, a drastic sanction for failure to respond may not be in order.[94]

Frequent use of drastic sanctions is less understandable for failure to respond to interrogatories than it is for failure to appear for a deposition, when, as a practical matter, the lesser sanctions may be difficult to apply. In the case of failure to respond to interrogatories, however, a court could examine the interrogatories which were not answered and order an appropriate sanction encompassing only the subject matter of those interrogatories.[95] Of course, interrogatories could be so broad that an order precluding from evidence matters encompassed by them, or designating facts relevant to the interrogatories as established, or refusing to allow the disobedient party to support or defend certain claims or defenses could possibly establish grounds for a summary judgment.[96] However, unless the interrogatories were very broad, this would not necessarily happen.

According to reported cases, federal courts do not often require the party failing to serve answers or objections to interrogatories, or his attorney, to pay the expenses caused by the failure.[97] The rule 37(d) provision that the court shall order payment of expenses unless there is a finding of substantial justification, or that other circumstances would make an award unjust, would seem to limit the trial court's discretion.[98] However, if such awards are being made regularly, they are not being reported.

Failure to serve written responses to a request for inspection submitted under rule 34. Rule 37(d) treats the failure to serve a written response to a request for inspection submitted under rule 34 in the same way as failure to appear for a deposition or failure to serve answers or objections to interrogatories. However, we found no cases dealing with the imposition of sanctions for this conduct alone.

Failure to Admit a Rule 36 Request

Rule 36, which is discussed in greater detail elsewhere in this text, permits a party to "serve upon any other party a written request for the admission . . . of the truth of any matters within the scope of rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of the law to fact, including the genuineness of any documents described in the request."[99] Under rule 37(c), if the responding party answers the request but either denies the matter or alleges that he cannot truthfully admit or deny, and the requesting party subsequently proves the genuineness of the document or the truth of the matter, the failing party can be required to pay the expenses of making the proof, including attorneys' fees.[100] The rule provides that the court shall order expenses paid unless it finds that: 1) the request was objectionable under rule 36(a); 2) the admission sought was of no substantial importance; 3) the failing party had reasonable grounds to believe he might prevail on the matter; or 4) other good reasons existed for the failure to admit.[101]

If a party completely fails to answer a request to admit, the truth of the matter is taken as admitted under rule 36. The requesting party cannot then proceed to prove the truth of the matter at trial and expect to tax expenses under rule 37(c) to the party who failed to deny the request.[102]

The reported cases clearly state that a decision not to impose expenses for failure to admit the truth of a matter later proven at trial is within the almost absolute discretion of the trial judge.[103] We found no cases in which a trial court was reversed for not imposing expenses. On the other hand, when the trial court has imposed expenses for a denial of a matter later proven at trial, courts of appeals have reversed when the denied request was not pertinent to the case,[104] was not part of the prima facie case,[105] asked for an admission on a conclusion of law, was related to the ultimate issues, or was merely a question of belief.[106]

Miscellaneous Misconduct

Federal trial courts have used the sanctions under rule 37 to deal with miscellaneous conduct not specifically described in the rule, such as insuring the smooth operation of pretrial conferences.[107] Rule 37 sanctions also have been imposed to sanction a party:

1) for failing to inform the opposing party of the existence of important witnesses until trial
2) for failing to file a witness list as ordered by the court[108]
3) for failing to file a conference report in accordance with a court order[109]
4) for failing to disclose the existence of releases which were necessary to a fair disposition of the case[110]
5) for violating a local rule requiring parties to make an effort to resolve discovery disputes[111]
6) for obtaining information by electronic eavesdropping and then giving inconsistent answers concerning that activity when questioned at depositions.[112]

In addition, two district courts have referred to rule 37 sanctions to deal with vexatious and unwarranted conduct amounting to general abuse of the discovery process.[113]

The discovery process can be misused to tie up litigation and harass opponents by requesting extraordinary amounts of material, supplying so much material that it is impracticable for the opponent to sort out relevant information, and filing unwarranted and groundless motions. The only available sanctions are those in rule 37 aimed at failures to make discovery[114] and the rarely invoked federal cost statute, 28 U.S.C. § 1927, which allows imposition of excess costs on an attorney who "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously."[115]

At present, there does not appear to be any effective means of sanctioning the abuse of process in the broader context.[116] However, proposed changes in rule 37 may broaden the rule to reach affirmative abuse of the discovery process.[117] In 1978, both an advisory committee of the Judicial Conference of the United States and a special committee of the American Bar Association proposed the promulgation of a new federal rule 37(c). The proposed section (c) refers to 28 U.S.C. § 1927 and authorizes the court to "impose upon any party or counsel, such sanctions as may be just, including the payment of reasonable expenses and attorney's fees, if any party or counsel (1) fails without good cause to cooperate in the framing of an appropriate discovery plan by agreement under rule 26(f), or (2) otherwise abuses the discovery process in seeking, making, or resisting discovery" (emphasis added). This amendment would give courts the power to sanction those who make unreasonable discovery demands. However, the advisory committee's 1979 revised draft dropped, without explanation or comment, any mention of the proposed section (c).

When the abuse in question involves unreasonable demands for discovery rather than failure to make discovery, the courts can give some relief by issuing protective orders under rule 26(c).[118] Because protective orders are not sanctions, we have not included them in our research. It should be noted, however, that the expenses incurred in relation to a protective order may be granted under rule 37(a)(4).

Observations on the Operation of Rule 37

Although rule 37 was intended to encourage drastic action against those who abuse the discovery process, reported cases indicate that courts seldom impose sanctions,[119] unless the behavior of the offender goes beyond a simple transgression of the rules. In general, courts will apply sanctions for discovery misconduct only after considering the following: (1) the extent of culpability of the offending party; (2) the extent of harm suffered by the requesting party and the administration of litigation; (3) the purposes and effect of the proposed sanction; and (4) the desire to avoid punishing a party for misconduct by counsel.

Extent of Culpability

The extent of culpability of the party failing to make discovery is perhaps the most important factor in determining whether or not to impose a sanction.[120]

Conduct in defiance of a court order is most likely to result in the imposition of a sanction.[121] Such conduct is not only an affront to the court's authority, but it raises a perception that the failure to make discovery is willful.

Although willfulness is not required for the imposition of all sanctions,[122] it is still an important factor in determining which sanction to employ.[123] Willfulness is, in most cases, the test of whether to impose a sanction at all and is required for the application of drastic sanctions.[124] Willfulness in failure to comply with discovery requests and orders can be demonstrated in a number of ways. The most important indicators are evasive responses,[125] continued delay in the process,[126] apparent dishonesty,[127] and complete failure to comply.[128] The Second and Eighth Circuits have both held that a hearing expressly addressed to the issue of willfulness should be held before a drastic sanction is imposed.[129]

When examining a party's culpability, courts may freely consider mitigating factors.[130] The credence given to particular excuses necessarily depends on the facts of individual cases, and trial courts are free to reject excuses which lack credibility.[131] Courts generally accept as excuses: illness of a party or his attorney,[132] destruction of records by fire,[133] inattention or ineptness of counsel,[134] incorrect routing of documents within the party's company,[135] and greater fault lying with the other party.[136]

Sanctions for refusal to comply are considered inappropriate if the requesting party is seeking discovery for an improper purpose, such as using it to gain information otherwise undiscoverable in a criminal proceeding.[137] In addition, the court of appeals has reversed drastic sanctions for failure to comply with a court order to make discovery when the requests for material are clearly irrelevant to the litigation.[138]

The court may also recognize simple mistakes as mitigators. One court has noted that the recalcitrant party was represented by a distinguished law firm and that no misconduct had occurred in the past. The court concluded that a warning would be sufficient to secure compliance.[139]

Extent of Harm Due to Misconduct

When determining sanctions, the federal courts have also considered the extent of harm done to the other party and to the administration of justice by the noncompliance with discovery requests and orders. When there is no showing of prejudice to the requesting party caused by the failure, courts have held that a drastic sanction is inappropriate.[140]

The relevance of the information sought is a key factor. When the information is essential to the litigation, or is important to the requesting party, courts consider failure to comply with discovery requests or orders a serious obstruction of the progress of the litigation and may impose a sanction.[141] One court balanced the interests of the requesting and the noncomplying party in arriving at its decision.[142]

Effect of Sanctions

Until recently the courts articulated only four primary reasons for using the rule 37 sanction: 1) to rectify prejudice suffered by the requesting party; 2) to secure compliance with the request; 3) to punish the disobedient party; and 4) to move the trial docket. Recently, several opinions have recognized a new purpose: to deter future misconduct.[143] When selecting a sanction, the court attempts to match the effect of the sanction to the end that the court hopes to attain.

Courts may rectify prejudice to the requesting party by ordering the party failing to make discovery to pay the reasonable expenses of bringing a motion to compel or those caused by the failure, establishing facts according to the claim of the requesting party, precluding evidence, dismissing the claim, or rendering a default judgment. The drastic sanctions of dismissal or default judgment obviously compensate a party for the failures of the disobedient party.

If a court wants to secure compliance with a request, it may use the lesser sanctions rather than the harsh sanctions which would terminate a case. Perhaps the most interesting method used to secure compliance with an order or request is a conditional order or warning threatening the imposition of sanctions should the misconduct continue.[144]

Although trial courts focus on the culpability of a party in determining whether to impose a sanction, the appellate courts, in reviewing sanctions, do not usually speak in terms of punishing the guilty party. One circuit has expressly stated in a leading case that "[t]he office of 37(d) is to secure compliance with the discovery rules, not to punish the erring parties."[145] However, the Supreme Court has recognized the penal function of sanctions,[146] and most cases at least implicitly recognize that a disobedient party suffers a punishment when a sanction is imposed,[147] if only by the use of the word "sanction" rather than "remedy."

Courts have also indicated that sanctions may be used to aid the administration of justice. Courts have imposed sanctions to "clear dead wood" from the docket[148] and to protect the integrity of court orders.[149]

Fault of Counsel

In recent years, the federal courts have begun to consider the fault of counsel in failing to make discovery and to impose sanctions directly on counsel. Generally, a party is charged with the actions of his attorney and must seek redress for the attorney's misconduct through a malpractice suit.[150] However, the malpractice suit does not always compensate an attorney's client, and there is a feeling that an innocent party should not suffer severe consequences when counsel was primarily to blame for the misconduct.[151] Therefore, when selecting sanctions, judges have been urged to "determine whether counsel or the party himself is at fault."[152] Both the Second and Eighth Circuits have stated that the extent of the attorney's responsibility should be considered a mitigating factor in deciding whether to sanction the party.[153]

Because dismissal and default deny the client his rights and may exact punishment disproportionate to his misconduct,[154] some argue that a client should not be deprived of his entire cause of action "without a hearing on the merits because of his attorney's negligence."[155] For instance, the Seventh Circuit weighs the rights of a litigant to have his case heard on the merits, despite the incompetency or lack of diligence of his counsel, against the needs of the court to control and manage litigation which threatens to unduly burden the court as a result of the attorney's failings.[156]

The imposition of costs may, if properly employed, effectively control and deter litigation abuses.[157] Courts may assess costs as a means of regulating the conduct of attorneys either in the exercise of the courts' inherent power to supervise attorneys or in pursuit of statutory authorizations.[158] Courts consider costs disciplinary and punitive when imposed on an attorney rather than on the client.[159]

Rules 37(a)(4), 37(b), and 37(d) authorize the imposition of costs on the attorney advising the person who fails to cooperate during discovery. In recent years, several courts have imposed expenses on attorneys who were at fault for failing to make discovery.[160] However, the expenses were imposed on the attorney only when it was clear to the court that he was at fault. One court stated that expenses should not be imposed on an attorney unless there is a showing that discovery was unjustifiably opposed at the attorney's instigation.[161] The difficulty with this approach is that a court must determine the relative fault of the attorney and his client, which may require considerable time and energy and may also impede the system of representative litigation.

The Deterrence Function of Rule 37 Sanctions

Traditionally, courts tailored discovery sanctions "to achieve remedial rather than deterrent purposes."[162] Several courts have recently recognized that the rule 37 sanctions may be imposed to deter misconduct in future cases. National Hockey League v. Metropolitan Hockey Club[163] acknowledged deterrence as a permissible goal under rule 37. In National Hockey League, the district court dismissed the plaintiffs' antitrust action for failure to make timely answer to written interrogatories as ordered by the court. The district court stated:

> After seventeen months where crucial interrogatories remained substantially unanswered despite numerous extensions granted at the eleventh hour and, in many instances beyond the eleventh hour, and notwithstanding several admonitions by the Court and promises and commitments by the plaintiffs, the Court must and does conclude that the conduct of the plaintiffs demonstrates callous disregard of responsibilities counsel owe to the Court and to their opponents, the practices of the plaintiffs exemplify flagrant bad faith . . . .[164]

The court of appeals reversed the judgment of dismissal, finding that the district court had abused its discretion. The court of appeals concluded that there was "insufficient evidence to support a finding that [plaintiffs'] failure to file supplemental answers by June 14, 1974 was in flagrant bad faith, willful or intentional."[165] The court of appeals based its decision upon evidence in the record showing that "extenuating factors were present"[166] which explained plaintiffs' repeated failures to meet discovery deadlines and evidence that the specific failure precipitating the dismissal was due to clerical error.[167] The Supreme Court noted that the district court's findings were supported by the record and reversed the judgment of the court of appeals. The Supreme Court held:

> The question of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.[168]

The Court went on to note that reviewing courts have a natural tendency to be heavily influenced by the severity of the sanction of dismissal, but that such leniency may result in "other parties to other lawsuits" feeling "freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts."[169] The Court stated:

> . . . the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.[170]

National Hockey League leaves several questions unanswered:

> 1) does the deterrence orientation apply to discovery sanctions other than default or dismissal, or to other procedural abuses? If so, how does it apply? 2) what is the degree of culpability necessary to justify such sanctions? 3) assuming the requisite culpability is found, how much discretion does the judge have to apply a sanction which terminates the litigation? 4) are there any constitutional limits or requirements with respect to the employment of deterrence-oriented sanctions in the discovery context?[171]

Several lower court opinions indicate that the deterrent function of the rule 37 sanctions is not limited to cases involving the severe sanctions of default or dismissal. Although several cases do involve dismissal,[172] opinions imposing monetary sanctions[173] and preclusion orders[174] have also recognized the deterrent effects of those less harsh sanctions.

It is too early for a definitive assessment of the impact of National Hockey League on the conduct of the courts in controlling discovery. Courts cite the case as authority for a more vigorous application of sanctions, and several lower court opinions have recognized the importance of deterring misconduct in the discovery phase of litigation.[175] Focus on deterrence by the federal courts in imposing sanctions would represent a significant shift in emphasis. However, a survey of recent cases concluded that a finding of willfulness is still, in most circuits, a prerequisite for the imposition of sanctions for abuse of the discovery process, and that past patterns of repeated extensions and warnings prior to imposing sanctions persist.[176]

III. RULE 41(b)

Rule 41(b) in General

Rule 41[177] governs the dismissal of actions. Under rule 41(a) a plaintiff may voluntarily dismiss an action before an answer or motion for summary judgment is served or by stipulation of all parties who have appeared in the action. Otherwise, a plaintiff can have the case dismissed voluntarily only "upon order of the court and upon such terms and conditions as the court deems proper."[178]

Rule 41(b) allows involuntary dismissal of an action.[179] Under 41(b), a defendant may move for dismissal of an action or of any claim against him on three grounds: 1) for plaintiff's failure to prosecute; 2) for plaintiff's failure to comply with the federal rules or any order of the court; and, 3) in an action tried by a court without a jury, at the close of plaintiff's evidence for failure to show a right of relief. Dismissal on the third ground is clearly not a sanction for delay or disobedience; our discussion, therefore, will include only dismissals on the first two grounds.

Rule 41(b) codifies the inherent power of the courts to dismiss a complaint if the plaintiff disobeys court orders or fails diligently to prosecute his claim.[180] Although the text of the rule refers to dismissal on motion by the defendant, the federal courts have consistently held that the power to dismiss is inherent in the court and can be exercised on its own motion.[181]

Rule 41(c) provides that the other subdivisions of rule 41 apply to the dismissal of a counterclaim, a cross-claim, or a third-party claim, except that a voluntary dismissal by the claimant alone must be made "before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing."[182]

Rule 41(d) provides that "[i]f a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant,"[183] the court may order the plaintiff to pay the costs of the previous action and may stay the proceedings until the plaintiff complies. The text of rule 41(d) refers to a voluntary dismissal. It has been held, however, that a court is warranted in applying the subsection to an involuntary dismissal based upon failure to comply with a pretrial order, since such a failure involves an element of voluntariness.[184] Of course, a plaintiff whose case has been dismissed under rule 41(b) cannot bring a new action on the same claim at all unless the court so provided in its order of dismissal.[185]

Current Operation of Rule 41(b)

Rule 41(b) provides for dismissal for failure of the plaintiff to prosecute or to comply with the federal rules or any order of the court. The misconduct constituting grounds for a rule 41(b) dismissal falls generally into one of the following categories:[186]

1) significant delay amounting to failure to prosecute
2) refusal to proceed to trial
3) failure to appear for trial
4) failure to appear for pretrial conference
5) failure to effect timely service of process
6) failure to amend a complaint or to file documents as ordered by the court.

Significant Delay Amounting to Failure to Prosecute

Most of the reported cases under rule 41(b) deal with failure to prosecute. Failure to prosecute can mean that the case simply lies dormant on the docket, and no action is taken to press it.[187] It can also mean that the plaintiff has engaged in active dilatory tactics such as groundless motions,[188] repeated requests for continuances,[189] and tardy filings.[190] A court reviews the entire record of the case in determining whether there has been a failure to prosecute. When it finds a history of delay over a period of several months or years, the court often dismisses the case.[191] Neither the rule nor the reported cases strictly define what constitutes sufficient delay to warrant dismissal for failure to prosecute.[192] In the cases, the delays range from three months[193] to fourteen years.[194] Most cases, however, involve failure to prosecute for periods of one to six years. Several courts have issued local rules providing how long a case may continue on a docket before it is in danger of dismissal for lack of prosecution.[195] The violation of a local rule can be a significant consideration in the decision to dismiss; however, the absence of a local rule does not bar dismissal.[196]

The delay can be compounded by repeated failure to obey court orders,[197] late responses or resistance to discovery,[198] failure to file pretrial materials with the court,[199] failure to respond to show cause orders[200] or motions,[201] failure to interview or subpoena witnesses,[202] failure to appear for pretrial conferences,[203] and requests for numerous pretrial conferences.[204]

The sanction for failure to prosecute is dismissal. No other sanction is mentioned in the rule, except that a dismissal may be without prejudice if the court so states.[205] Courts have occasionally dismissed without prejudice,[206] but the vast majority of dismissals for failure to prosecute operate on the merits. One court has suggested a number of alternate remedies to dismissal, including warnings, formal reprimand, placing the case at the bottom of the calendar list, fine, imposition of costs or attorneys' fees, temporary suspension of counsel from practice before the court, and dismissal of the suit unless new counsel is secured.[207]

Whether a dismissal for failure to prosecute will be sustained on appeal depends "on whether it was within the permissible range of the court's discretion."[208] Some circuits, although not setting any strict rules, have indicated the factors that trial courts should consider in determining whether to sanction a failure to prosecute and have indicated when an abuse of discretion will be found. The Ninth Circuit, for instance, has stated that there is a presumption that the defendant has suffered prejudice from the delay caused by lack of prosecution,[209] and it will overturn a dismissal for lack of prosecution only if there is a definite and firm indication that the trial judge committed error.[210] The factors the Ninth Circuit will consider are: 1) the plaintiff's right to a hearing on the claim; 2) the impairment of the defendant's defenses presumed from unreasonable delay; 3) the policy in favor of prompt disposition of cases; and 4) the duty of the plaintiff to proceed with due diligence.[211] Under this standard of review, it is not surprising that most appeals from dismissals under rule 41(b) for lack of prosecution have resulted in affirmance.[212]

The Fourth and Fifth Circuits are less exacting. The Fourth Circuit has held that the sanction of dismissal should be applied in light of the public policy favoring disposition of cases on their merits. According to the Fourth Circuit, when determining whether to dismiss a case, a court should balance four factors: 1) the degree of the plaintiff's personal responsibility for the delay; 2) prejudice to the defendant occasioned by the delay; 3) any history of proceeding in a dilatory manner; and 4) effectiveness of sanctions other than dismissal.[213] The Fifth Circuit has stated that because dismissal is a drastic sanction, it is to be used only when there is a clear record of delay or contumacious conduct by the plaintiff; consideration must be given to whether lesser sanctions would better serve the interests of justice.[214] In the Fifth Circuit the factors which lead to a dismissal include: 1) significant periods of total inactivity by the plaintiff; 2) repeated warnings of dismissal; 3) several failures to obey court rules; and 4) no adequate excuse for the misconduct.[215]

The Second Circuit places less emphasis on a showing of prejudice to the defendant by the delay. Lack of diligence on the part of the plaintiff is sufficient, although prejudice to the defendant may be considered.[216]

In addition to the factors mentioned above, federal courts have considered whether the defendant contributed to the delay,[217] whether there appears to be any merit to the plaintiff's claim,[218] and whether it was the plaintiff's attorney rather than the plaintiff himself who was at fault.[219]

Generally, if the plaintiff hopes to justify the lack of prosecution, he must show that the failure was due to inability fostered neither by his own conduct nor by circumstances within his control. Excuses found valid on appeal have included illness of the plaintiff,[220] illness of his attorney,[221] death of a trustee,[222] illness of a key witness,[223] confusion over the calendar,[224] and reliance on statements by the court clerk.[225] But the excuses of conflicting responsibilities at another court,[226] ignorance of the presence of the case on the dismissal calendar,[227] ignorance of the amount of activity required,[228] being on vacation,[229] unfamiliarity of the counsel with the case,[230] and unavailability of the plaintiff because he was a fugitive[231] have all been rejected.

Only one case was found in which an appeals court reversed a lower court because it failed to dismiss for lack of prosecution. In Tradeways Incorporated v. Chrysler Corp.,[232] the trial court denied a motion to dismiss for lack of prosecution. The original complaint was dismissed twice for lack of prosecution, but was restored to the calendar with the defendant's consent. Prior to trial, the plaintiff requested two more continuances, whereupon the defendant moved to dismiss. The Second Circuit, in reversing a judgment for the plaintiff, stated that the defendant's prior leniency in twice consenting to extensions should not weigh against it in determining whether the delay had been intolerable, and noted that the defendant had lost a key witness because of death during the period of delay.

Refusal to Proceed to Trial

Failure to prosecute can also mean refusal to proceed with the trial when so directed by the court. Clearly, a refusal subjects the plaintiff to serious danger of dismissal under 41(b).[233] As one court stated, the plaintiff leaves the judge "little choice" but to dismiss when such a refusal occurs.[234] Nevertheless, where it appears that the refusal to proceed was not for the convenience of counsel but rather because a key witness was ill[235] or because unavailability of certain evidence created an inability to prove the case at the time it was set for trial,[236] or where there was no contumacious conduct but rather a court too concerned with its docket,[237] dismissal for refusal to proceed has been held to be too harsh a sanction. In general, the courts are willing to consider whether the refusal to proceed was based on a reasonable excuse.

Failure to Appear for Trial

Failure to appear on the scheduled trial date violates rule 41(b) and, therefore, may be sanctioned by dismissal.[238] However, in the absence of contumacious indifference, dismissal for failure to appear for trial is improper.[239] One appellate court has suggested that a more appropriate remedy would be dismissal without prejudice.[240]

Here again, the courts of appeals have exhibited a willingness to entertain excuses for the failure to appear. If the excuse is a reasonable one, dismissal under 41(b) is considered too harsh a sanction and therefore an abuse of discretion. Acceptable excuses have included death of a trustee,[241] confusion in communications between court and counsel,[242] confusion over the court calendar,[243] an overextended attorney who was not guilty of contumacious conduct,[244] and illness of the plaintiff.[245]

If the plaintiff appears for trial unprepared to move forward, this is treated in the same way as failure to appear altogether. Dismissal is in order when there is no reasonable excuse,[246] but when, for example, the plaintiff can demonstrate that counsel was taken ill,[247] dismissal with prejudice may not be justified.

Failure to Appear for Pretrial Conference

A rule 41(b) dismissal may be used if a plaintiff fails to appear at a scheduled pretrial conference or other hearing. When failure to appear for a hearing or pretrial conference was accompanied by a clear record of delay,[248] no evidence of prosecutorial intent,[249] or repeated warnings that dismissal would result if the plaintiff was not ready for the pretrial conference,[250] dismissal for lack of prosecution has been upheld.

However, the appellate courts, because of the drastic nature of the sanction, have demonstrated a willingness to consider any reasonable excuse. Dismissals based on this kind of pretrial misconduct have been reversed when:

1) the court order to appear could be reasonably misunderstood and there was no showing of bad faith[251]

2) the defendant was attempting to take advantage of the plaintiff by sending documents to an attorney who was known not to be attending to his practice[252]

3) the only failure was caused by an associate counsel in a distant city who failed to check the law bulletin for notice of status calls[253] or by local counsel who failed to notify out-of-state counsel[254]

4) the plaintiff did not appear to be responsible for his attorney's conduct[255]

5) counsel attempted to notify the court of his inability to be present and sent other counsel[256]

6) counsel was under indictment and was occupied by his own problems[257]

7) the plaintiff was unable to employ local counsel.[258]

Failure to Effect Timely Service of Process

Unreasonable delay in effecting service of process can amount to failure to prosecute.[259] No specific standards have been set as to what is an unreasonable time. The cases range from dismissal for failure to serve within a year after suit was brought[260] to eight years' delay.[261]

Most of the reported cases of this conduct are from the Second and Ninth Circuits.[262] The Second Circuit holds that unreasonable delay in service is sufficient ground for dismissal. No actual prejudice to the defendant need be shown, only lack of diligence on the part of the plaintiff.[263] However, prejudice to the defendant may of course be considered.[264]

The Ninth Circuit presumes that the defendant suffers prejudice by an unreasonable delay in service of process.[265] The fact that the plaintiff filed shortly before the expiration of the statute of limitations and that the case did not appear to be particularly strong have been factors in favor of dismissal for failure to effect service.[266]

Failure to Amend Complaint or to File Documents as Ordered by the Court

Rule 41(b) also provides for dismissal when the plaintiff fails to comply with an order of the court.[267] This rule has been used to deal with two basic kinds of conduct: failure to amend a complaint as ordered by the court and failure to file documents with the court as ordered.[268]

When the court has ordered a plaintiff to amend a complaint either because it violates rule 8(a)[269] or because amendment is necessary to preserve the claim,[270] and plaintiff has failed to comply, district courts have dismissed under rule 41(b). Courts recognize that dismissal is a harsh sanction to be used only as a last resort,[271] but when a court has given the plaintiff several opportunities to amend and plaintiff has not done so, dismissal has been affirmed.[272]

District courts have also dismissed for failure to comply with orders to produce documents to the court,[273] to file a note of issue,[274] to submit a summary of the legal theories of the case,[275] to file a summary of the evidence,[276] to file a pretrial statement,[277] and to file a brief in response to a motion.[278] However, the reported cases indicate that the courts of appeals examine dismissals for such conduct and often reverse the trial courts. Courts have held dismissal an abuse of discretion when there was no showing of fault on the part of the plaintiff;[279] when the trial court failed to consider or impose lesser sanctions to deal with the conduct;[280] when the document was not relevant to the proceeding;[281] or when there was a misunderstanding of the court's order.[282] On the other hand, when the plaintiff's failure was the result of inexcusable neglect,[283] or was symptomatic of a loss of intent to prosecute,[284] dismissals have been affirmed.

Attorney vs. Client Responsibility

The problem of punishing the client for the attorney's misconduct has been raised under rule 41(b) as well as under rules 37 and 55. In Link v. Wabash Railroad,[285] the Supreme Court affirmed dismissal of a suit under rule 41(b) for lack of diligence on the part of plaintiff's attorney. Six years after commencement of the suit and after two continuances, the trial judge scheduled a pretrial conference. On the appointed day the attorney for the plaintiff telephoned the judge's chambers and informed the judge's secretary that he would be unable to be present at the scheduled time because he was working on papers to be filed with the Illinois Supreme Court. At the pretrial conference, the judge reviewed the history of the litigation and dismissed the case sua sponte for failure to prosecute and appear for the pretrial conference. The Supreme Court held that plaintiff should not be relieved of responsibility for his counsel's actions; the Court said that "petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent."[286]

Although the weight of legal authority still follows the agency theory articulated in Link,[287] a number of opinions from the Fourth and Fifth Circuits have held that when the plaintiff himself appears to be innocent of misconduct, dismissal for failure to prosecute is too harsh a penalty.[288] These opinions indicated that in such cases use of lesser sanctions would be more appropriate.

Although dismissal is the only sanction provided by rule 41(b) for misconduct which falls under that rule, a few cases have held that a trial court has the power to fine the plaintiff or his attorney for such misconduct.[289] However, this does not appear to be a common practice.

IV. RULE 55

The Provisions of Rule 55

Rule 55 is to the defendant what rule 41(b) is to the plaintiff.[290] Rule 55(a) provides that "when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules" a default can be entered against him. On the basis of the entry of default, the court (or in certain cases the clerk) can enter a judgment pursuant to rule 55(b). "The procedure to be followed upon default involves two operations: the entry of default; and thereafter the entry of judgment by default."[291]

The clerk may enter a default judgment against a defendant who has been defaulted for failure to appear when the claim against the defendant is for a sum certain or for a sum which can be made certain.[292] In all other cases, the judgment by default can be entered only by the court.[293] If it is necessary for the court to make any findings of fact in order to enter judgment or carry it into effect, the court may conduct hearings or order references.[294] A default judgment cannot be entered against the United States "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."[295]

If the defendant has appeared in the action, he is entitled to written notice three days before a judgment is entered on his default.[296] The required appearance need not be a formal one.[297] Preliminary motions have been held sufficient,[298] as have requests for extension of time to answer[299] and participation in settlement negotiations[300] or in preparation of stipulations.[301] Even an appearance in an action dismissed for the plaintiff's failure to prosecute has been held sufficient to require notice before entry of default judgment following defendant's failure to answer plaintiff's refiled complaint.[302] The thrust of the cases seems to be that a defendant who has made it sufficiently clear that he intends to defend the proceeding is entitled to notice before a default judgment is entered against him.[303] On the other hand, the failure to give the notice to which the defendant is entitled does not make the ensuing judgment void.[304]

The default, when no judgment has been entered, can be set aside under rule 55(c) "for good cause shown." However, according to rule 55(c), if a judgment has been entered, the defendant has no recourse except to move under rule 60(b) to vacate the judgment. A plaintiff who has brought a counterclaim must follow the same course as a defendant to have a default judgment set aside.[305]

If the defendant has let the time for appeal run out and resorts to a motion under rule 60(b), it will be a matter of discretion whether to grant the defendant relief.[306] The grounds available under 60(b) are fairly broad, but the court has a good deal of discretion in applying them, and most of them become unavailable after a year. Rule 60(b)(6) contains a catchall which can be invoked to vacate the judgment after the year is up.[307] However, the court requires a showing of extraordinary circumstances to support an application of 60(b)(6).

Current Operation of Rule 55

Courts consider the imposition of default a harsh penalty.[308] The policies governing the exercise of discretion and the scope of appellate review in default cases resemble those in cases of dismissal for misconduct on the plaintiff's part. The district court has broad discretion, which the court of appeals will interfere with only on a showing of an "abuse."[309] However, because of the policy of reaching the merits,[310] both district and appellate courts are inclined to be lenient if the defendant seems to have a meritorious defense and is ready to proceed.[311]

Even in the case of default, the plaintiff still bears the burden of going forward with the case.[312] If the plaintiff sues the federal government or a federal official, he must actually introduce evidence in order to recover a default judgment.[313] In other cases, default establishes the allegations of the complaint,[314] but the plaintiff will still not prevail if those allegations do not show entitlement to relief.[315]

The level of misconduct or dilatoriness necessary to support a default judgment seems to be slightly higher than that needed to support an involuntary dismissal. In one case, a district court had defaulted a defendant and dismissed his counterclaim; the court of appeals set aside the default judgment but refused to reinstate the counterclaim.[316] The defendant had been diligent enough to be allowed to defend further, but not diligent enough to be allowed to seek affirmative relief. Similarly, in another case in which neither party did anything for two years, the court dismissed the case for the plaintiff's dilatoriness, rather than rendering a default judgment for the equal dilatoriness of the defendant.[317]

Rule 55 provides for default in case of failure to "plead or otherwise defend." The failure in question may fall into any of the following categories:

1) total disregard of the litigation
2) preliminary steps, but no answer
3) late answer
4) failure to participate satisfactorily in later stages of the proceeding.

If the failure to proceed involves failure to make discovery, the default judgment will be predicated on rule 37 rather than on rule 55, under the reasoning of Societe Internationale v. Rogers[318] which specifically provides that a dismissal under rule 41(b) is improper in a case to which rule 37(b) applies. The same reasoning would seem to preclude the use of rule 55 when rule 37 could be applied,[319] although the procedures of 55(b) have been followed in such cases to establish the amount of damages.[320]

Ignoring the Litigation

If a defendant is not heard from after being properly served with process,[321] the clerk may enter defendant's default under rule 55(a), and the court may then proceed to judgment in defendant's absence under 55(b).[322] If the defendant appears between the entry of default and the entry of judgment, the default may be set aside under 55(c) "for good cause shown." However, the same thing that kept the defendant from appearing at the outset (ignorance, indolence, or, in some cases, arrogance) usually continues to keep the defendant away until the actual weight of the judgment is felt, forcing the defendant to move to reopen under rule 60(b). Theoretically, 60(b) sets stricter standards for reopening a judgment than 55(c) provides for setting aside a default.[323] Actually, the few 55(c) cases we have found seem to use the same considerations as the 60(b) cases do:[324] how good an excuse the defendant has for not answering when he was supposed to and how good a defense he will have to offer if the case is reopened.

In some cases, the defendant appears to have no excuse at all. In one, the plaintiff practically begged the defendant to answer and waited four years before having a default judgnent entered. The defendant waited another three years before moving, unsuccessfully, to reopen.[325] At the other end of the spectrum, a unique example of a good excuse is presented by Klapprott v. United States,[326] in which, at the time of the default, the plaintiff (the government) was holding the defendant in jail under a different proceeding and had intercepted the letter he wrote trying to get legal representation.

Most excuses fall somewhere between these extremes:

1) the defendant mailed his summons to his lawyer, who never got it[327]

2) the defendant was sued as a guarantor and turned over his summons to his principal's attorney, who agreed to take care of it[328]

3) service was effected by means of a longarm statute and the docket became confused[329]

4) the complaint was handwritten on yellow paper and the defendant thought it was a crank letter[330]

5) the proceeding was in rem and the defendant seeking to set aside the default is a successor in title to the one who defaulted.[331]

It would seem that in all these cases a less nonchalant or less trusting defendant would have avoided the default, or would have avoided buying the property affected by it. However, the court evidently found the excuses sufficient.

It appears that no excuse suffices without some showing of a meritorious defense.[332] The court always has discretion in reopening a judgment and it will not exercise its discretion unless it serves a substantive purpose. The cases do not indicate whether a defendant will prevail on a strong showing of a meritorious defense without showing a good excuse for not presenting that defense at the proper time.[333]

The courts may consider prejudice to the plaintiff. While we found no case in which a default judgment stood because of such prejudice, there are several in which the court listed the absence of such prejudice among the reasons for reopening.[334] Presumably, if the plaintiff's witnesses had died or moved away, or something else of the kind had happened, the court would tend to let the judgment stand.

While nothing prevents a default judgment immediately after the lapse of the twenty days provided in rule 12 for answering, the appeals courts seem more willing to let a judgment stand if a longer time has elapsed. When courts refuse to reopen they include the lapse of time among their reasons,[335] and when they do reopen they say they are doing so in spite of the lapse of time.[336] Similarly, the courts are sometimes more receptive to a 60(b) motion if it is filed immediately after judgment than if it is filed toward the end of the year provided for as a time limit on most grounds for reopening.[337]

Preliminary Steps, But No Answer

The courts need not treat a defendant who is trying to litigate any better than one who pays no attention to the case, but they tend to be more lenient with the interested defendant. The courts are apt to point out that the plaintiff has no indefeasible right to have an opponent defaulted.[338] They are apt to examine whether there is any prejudice to the plaintiff from the delay.[339] And they are apt to hint that the plaintiff is acting in bad faith.[340]

Courts openly favor the defendant if he was entitled to notice under 55(b) and was not given it;[341] if he retained a lawyer who withdrew because of the pressure of other business;[342] if he inadvertently filed a motion for summary judgment instead of the 12(b) motion that would have automatically extended his time for answering;[343] if he filed a second and tardy 12(b) motion because of his attorney's mistake concerning the time limitations for filing such a motion;[344] if he answered the original complaint but forgot to answer an amended one.[345] Courts also favor a corporate defendant which attempted to appear in propria persona, overlooking the metaphysical and legal obstacles to its doing so.[346] In all these cases, the courts look for a good excuse and a meritorious defense; but they focus primarily on the good faith of the defendant and the lack of prejudice to the plaintiff.

There are exceptions. A defendant who kept indicating that he just wanted a little more time was not allowed to set the default judgment aside,[347] and a defendant who waited eleven or twelve years before moving under 60(b) was told she had moved too late. While she had not been given the notice required by 55(b), she had known about the judgment long enough.[348]

A stricter case came from the Ninth Circuit, which is also stricter than other circuits in dismissal cases under rule 41(b). In this diversity case, the defendant removed to the federal court. After removal, he failed to answer, evidently because his lawyers did not understand the removal process. He appeared before judgment and moved to have his default set aside. The court denied the motion, entered judgment, and was affirmed on appeal because such matters are within the discretion of the trial court.[349]

Late Answer

If the defendant serves a late answer,[350] or submits a proposed answer either in opposition to the plaintiff's motion to enter judgment by default[351] or in support of his own motion to set aside a default on which judgment has not yet been entered,[352] the defendant will probably succeed in having tardiness forgiven and the answer accepted. We found only two cases of late answers in which the trial court allowed a default to stand, and in one of them the trial court was reversed.[353] In the other, the defendant compounded the late answer by not appearing at the hearing at which the court was to decide how to handle the late answer.[354]

In most late answer cases, the courts seem to be only mildly interested in the defendant's excuse.[355] Courts look mainly at the lack of prejudice to plaintiff from the delay,[356] the policy of disposing of cases on the merits,[357] and in some cases, the quality of the defense offered by the proposed answer.[358]

Later Stages

Failure of a defendant to appear or to be represented at a duly scheduled pretrial conference has occasionally been a ground for default, but in most cases the appellate courts have considered default too drastic.[359] Failure to comply with discovery requirements has been dealt with in our treatment of rule 37. Only two other cases involve default between the close of pleadings and the start of trial. In the first case, the defendant was defaulted for failure to file stipulations of facts as ordered by the trial court. The court of appeals reversed because the defendant had not failed to "plead or defend" and the federal rules do not authorize orders to file stipulated facts.[360] In the second case, defendant failed for a year to obey a court order to engage new counsel after previous counsel had withdrawn. For this "cavalier disregard of a court order" the court of appeals took the unusual step of ordering the district court to grant a default judgment, reversing its decision not to do so.[361]

Court decisions do not clearly indicate what sanctions may apply if a defendant fails to appear for the actual trial. Bass v. Hoagland[362] seems to hold that a defendant is under no obligation to appear at a trial: The only sanction is that the trial can go forward without him and he will lose the opportunity to put in arguments or evidence. However, the plaintiff will still not prevail unless the plaintiff proves the case. After setting forth these principles, the court went on to say that if the failure to appear for trial were a default, the defendant would have to have three days' notice under 55(b) before a judgment was entered.

Bass lays down two alternative approaches and chooses the first. The court preferred to proceed with the trial in the defendant's absence. Assuming the defendant has been properly notified of the date, this seems an entirely satisfactory way to deal with the situation. Alternatively, the court could abort the trial, enter a default under rule 55(a), then proceed to judgment on three days' notice under 55(b). Note that if the first course is taken (the one preferred in Bass and followed in state cases such as Coulas v. Smith[363]), there must be a trial on the merits and the term "default" is inappropriate. If the second course is taken, no judgment should be entered until notice is given under 55(b).

The actual cases are not so simple. We have found two cases in which the court held the trial on the merits as envisaged by Bass, but referred to the resulting judgment as a default judgment.[364] In one of these, a new trial was ordered on the issue of damages, evidently for lack of notice under 55(b).[365] In another case the court entered a default judgment without either a trial or a 55(b) notice. Defendant was unable to have the judgment reopened because it failed to show that it had a meritorious defense.[366]

Problems of Representation

As with the other sanctions provided by the federal rules,[367] default has given rise to its share of cases holding that it would be inappropriate to penalize a client for what his lawyer has done wrong[368] and its share of cases holding that the client has chosen his lawyer and is responsible for the results.[369] Default presents some unique situations, however, because a plaintiff can usually set the time for the initial moves in a lawsuit, while a defendant must meet specific deadlines after being sued. There are cases, therefore, in which a defendant is unable to get counsel,[370] or is dilatory about doing so;[371] there are cases in which counsel do not understand the applicable law[372] or do not have their office routines properly worked out;[373] and there are cases in which it is not entirely clear which defendants the counsel is supposed to be representing.[374]

In all these situations, the courts are generally lenient. In one case, for instance, a defendant waited for five months after his counsel withdrew before employing new counsel a week before a scheduled pretrial conference. The new counsel moved to postpone, presumably because he had no time to prepare. Then counsel failed to attend, claiming that he had been mistaken about the date. The trial court defaulted the defendant, saying it was his fault for waiting so long to get new counsel. But the court of appeals thought the sanction too harsh.[375]

V. THE INTERRELATION OF RULES 37, 41(b), AND 55

The language of rules 41(b) and 55 could be read to apply to the failure of a party to provide discovery. Rule 41(b) allows a defendant to move for dismissal if the plaintiff fails "to comply with these rules or any order of court," and rule 55 provides for default "when a party against whom a judgment for affirmative relief is sought fails to plead or otherwise defend. . . ." However, rule 37 has been held to be the exclusive source of authority for sanctions for discovery abuses.[376] Rule 37 does not expressly state that it is the sole authority for enforcement of the discovery rules, but several features of the rule support this reading: the rule's title, "Failure to Make Discovery: Sanctions;" its inclusion of a full arsenal of sanctions, as well as detailed provisions for their use; and its deliberate placement at the end of the twelve discovery rules.[377] Nevertheless, prior to the holding of Societe Internationale v. Rogers,[378] courts were uncertain as to the proper source of authority for imposing discovery sanctions. In practice, courts frequently looked beyond rule 37 when penalizing discovery noncompliance.[379] This resulted, unfortunately, in a wide divergence in sanctions applied.[380]

The practice of relying on sources of authority other than rule 37 for imposing discovery sanctions was condemned by the

Supreme Court in Societe Internationale v. Rogers. In Societe Internationale, the district court dismissed the action because plaintiff failed to comply with an order to produce documents.[381] The district court cited both rule 37 and "the general equity powers of a federal court"[382] as authority for the dismissal. The court of appeals affirmed the decision and "chose not to rely upon Rule 37, but rested such power on Rule 41(b) and on the district court's inherent power."[383] For the Supreme Court, the "determinative question" was actually whether the dismissal was a denial of the plaintiff's due process rights,[384] but in its opinion, the Court stated that a dismissal for discovery abuses must be based exclusively on rule 37:

> In our opinion, whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery . . . . There is no need to resort to Rule 41(b), which appears in the part of the Rules concerned with trials and which lacks specific reference to discovery.[385]

The Supreme Court refused to approve the district court's use of inherent power, instead of rule 37, to dismiss the case.[386] The holding reflects a concern "that recourse to any other rule or to the concept of inherent power to impose the same sanction would only obscure the statutory formulation."[387]

The literature draws no general conclusion as to Societe Internationale's practical effect. The Supreme Court's holding may simply imply that federal courts cannot augment or amend the power explicitly provided in rule 37 by relying on other sources of authority.[388] It has been argued, however, that the holding in Societe Internationale leaves room for courts to rely on other sources of authority--particularly its inherent powers--when shaping a sanction not enumerated in rule 37 for a violation of discovery.[389] Therefore,

> when litigant's conduct results in a breach of discovery rules and the rules are silent concerning the appropriate remedy, it seems necessary to continue to rely on "inherent power" for the authority necessary to curb the abuse. Since the rules usually provide for analogous infractions, a court could find in them considerable guidance which should give some structure to this otherwise amorphous notion."[390]

VI. RULE 36 ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS

Rule 36[391] provides a sanction for not answering requests for admission or for answering them unsatisfactorily: the fact requested to be admitted will be automatically deemed admitted as true unless a party responds within the designated period of time with a specific, nonevasive denial or with an objection to the request.

Generally, there is no middle ground in applying this sanction. The court either deems a fact admitted automatically or imposes no sanction at all. Some courts have taken a "balancing approach" in cases in which an admission would unduly prejudice the nonresponding party's case, but in which prejudice to the requesting party would result if no action were taken.[392] However, courts seldom use a balancing approach. In most cases, the court simply applies the sanction if prejudice would otherwise result to the requesting party. The court generally points out that to avoid sanctions a party has only to follow the rule: Either deny or object to each request for admission.[393]

The court does sometimes attempt to balance procedural sanctions against the merits of the nonresponding or inadequately responding party's case. Under this compromise approach, matters which the court deems admitted may be contested at trial with evidence to show why the admissions should be disregarded. The burden of proof is placed on the nonresponding party. This approach has been criticized, however, and is not prevalent in the courts today. Critics argue that an admission is conclusive against the party and that allowing an admission to be contested defeats the purpose of rule 36 (which is to eliminate the need to prove things at trial which the adversary cannot fairly dispute).[394]

As with other discovery sanctions, the court has ample discretion under rule 36 in deciding whether or not to deem a fact admitted;[395] whether a request will be deemed admitted depends upon the particular situation, the excuse given for failure to respond, and often which circuit one is in.[396]

The cases which deal with the question of whether or not a matter should be deemed admitted fall into three major categories of misconduct: totally ignoring requests for admission; late responses; and inadequate or inappropriate responses.

Totally Ignoring Requests for Admission

If a party does not respond to a request, that is, if a party neither answers nor objects to requests for admission, the matter will be deemed admitted under rule 36. In many cases, the courts apply this provision automatically. Either the party offers no excuse, or the court does not consider it worthy of discussion.[397] In other cases, the court considers and rejects the reason for not responding. For instance, excuses based on incorrect theories about the permissible scope of a request for admission are usually not considered sufficient.[398]

To prevail in a court willing to hear excuses, the nonresponding party must persuade the court that the omission was in no way willful. Illness may be allowed as an excuse if the party responds promptly upon recovering.[399] Courts will accept nonreceipt of the requests for admission as an excuse if the party has kept the court aware of his current address.[400]

Late Responses

Most courts accept late responses to requests for admission if there is no prejudice to the requesting party and no showing of bad faith on the part of the responding party.[401] Courts have allowed late responses when the party's lawyer was away in service or on vacation,[402] when the party claimed that the requests were too ambiguous to answer on time,[403] when five out of six of the requests were improper,[404] when the lawyer was not familiar with the Federal Rules of Civil Procedure,[405] and when a party forgot to send the requests to his lawyer.[406]

Although the courts are usually lenient in allowing late responses, they will deem an admission if it appears that the party responded late in bad faith. For instance, when a party claimed excusable neglect, then failed to support that claim with an affidavit explaining the lateness, the court imposed the admission instead of accepting the response.[407] The court deemed a matter admitted when a late answer was still incomplete,[408] and the court held an excuse of being absent did not support a late answer when the requests were sent long before the party's absence.[409]

Inadequate or Inappropriate Responses

According to rule 36, if a party wishes to deny the facts set forth in a request to admit, he must do so specifically:

> a denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder . . . .

If an answer is not specific enough, if it is overly qualified, if it is unclear,[410] or if it appears to be argumentative, it can be deemed an admission.[411]

The courts take a strict view of what is an acceptable denial. If a party does not squarely affirm or deny a request, he is generally required to give detailed reasons why and to assure that a reasonable effort has been made[412] to find out the truth or falsity of the request.

If a good excuse exists the court may allow incomplete answers to be amended,[413] although generally the courts are less inclined to allow an insufficient answer to be amended than they are to allow a late response.[414] If a denial appears deliberately evasive, the court quickly applies the sanction.

Clearly, if a court takes excuses into account and then orders a clearer response,[415] a party must respond very specifically the second time.[416] Because the courts infrequently allow inadequate responses to be amended, they are not disposed to be lenient when a second response also fails.

VII. MISCELLANEOUS RULES

Rule 11

Rule 11 requires every pleading to be signed by an attorney, or by the party if he is appearing pro se.[417] The attorney's signature certifies that to the best of the attorney's knowledge and belief good grounds support the pleading, and that the pleading is not interposed for delay. If an attorney does not sign a pleading, or signs it with intent to defeat the purpose of the rule, it may be stricken as sham,[418] and an attorney may be disciplined for willful violation of the rule.

It has been held inappropriate to strike a pleading under this rule merely because it was inadvertently left unsigned.[419] Presumably, if there were a question whether counsel would be willing to sign the pleading and certify that there was good ground to support it, the court could require the attorney to sign it on pain of having it stricken.

The court may find a pleading unsupported when the pleading contains a palpably false allegation or one that can be shown to be false by consulting an easily accessible public record (though before striking the pleading the court should give the party a chance to amend by deleting or qualifying the offending allegation);[420] when plaintiff apparently has no capacity to sue;[421] when it appears that counsel initiated the suit on a rumor and intends to use discovery to find how good a case he has;[422] or when the suit was initiated merely to divert, forestall, or anticipate administrative proceedings.[423] Striking a pleading under rule 11 is no substitute for dismissal under 12(b)(6), judgment on the pleadings under 12(c), or summary judgment under 56. If counsel is pleading in good faith after due investigation, the weakness of his case is not a ground for striking his pleading.[424]

The general denial, that is, a denial of all the allegations of a complaint, poses special problems under rule 11, because it is sometimes hard to believe that a defendant actually intends in good faith to controvert all the allegations of the complaint without exception. However, in the only case directly dealing with the point, the court said that it was required on a motion to strike the answer as sham to accept counsel's assurance that he did in fact intend to controvert all the allegations. The court hinted, though, that if it turned out that counsel was not defending as broadly as he said he would, disciplinary action would be in order.[425]

We found only two cases of counsel being actually disciplined under rule 11.[426] One was only a reprimand spread on the court's records; in the other, a more severe sanction was reversed for lack of procedural due process.

Rule 16

Rule 16 permits the court, in its discretion, to direct the attorneys for the parties to appear for a pretrial hearing to simplify the issues, amend the pleadings, and take other actions which may aid in the disposition of the case. The court then issues an order that recites the action taken at the conference, providing the framework for subsequent litigation.

Most of the cases under rule 16[427] involve excluding testimony not provided for in the pretrial order. We have not dealt with these cases because it seems that exclusion under these circumstances is not a sanction for misconduct but an enforcement of the rule that the pretrial order agreed on by the parties governs the subsequent course of the litigation. Other cases involve sanctions for failure to show up for scheduled pretrial conferences. These have been dealt with under rules 41(b) and 55, depending on whether it was the plaintiff or the defendant who failed to appear.

A number of cases deal with failure of a party to produce an adequate pretrial statement as ordered by the court. Many district courts expect counsel to come to a pretrial conference with a statement of the claims or defenses that he hopes to establish at trial and the evidence he proposes to use to establish them, or at least to come with a list of the witnesses and exhibits he intends to introduce at the trial. Some judges impose requirements of this kind in individual cases; some courts embody them in elaborate local rules.

Appellate courts tend to be less enthusiastic about pretrial statements; both individual orders and local rules have been stricken down as imposing an undue burden on the litigant.[428]

The appellate cases on these matters are few and not altogether clear, but they seem to establish that the district court has power under rule 16 to require a pretrial statement if it is not too elaborate,[429] and that a sufficiently contumacious failure to file such a required statement can be treated as a failure to litigate, punishable by dismissal or default.[430] The authorities are not clear on whether the court may, instead of dismissal or default, issue a preclusion order preventing a party from introducing issues, witnesses, or exhibits not listed in his statement.[431]

Local Rules

Rule 83 authorizes district courts to make separate local rules of practice "not inconsistent with these rules."[432] These rules affect the imposition of sanctions most strongly by specifying circumstances in which a case will be dismissed under rule 41(b). District courts may provide that an action will be automatically dismissed, or will be dismissed unless cause is shown for retaining it, either if process has not been served within a specified time (forty days to one year),[433] or if the docket shows no activity for a specified time (three months to two years).[434] Two districts provide a possibility of dismissal for failure to go to trial on schedule.[435]

Some district courts also provide specific grounds for disciplining attorneys or holding them in contempt, usually for the making of frivolous or unnecessary motions.[436] In two districts, interference in the assignment of judges is grounds for discipline.[437]

Frivolous and unnecessary motions can result in imposition of costs and attorneys' fees under a number of local rules.[438] Under some rules, costs, attorneys' fees, and jury fees are imposed for delaying a trial or requiring a continuance.[439]

Some districts provide sanctions for failure to file a trial brief. Sanctions may include default or dismissal, dropping the case from the trial calendar, or imposition of costs and attorneys' fees.[440]

Many districts provide for failure to appear at scheduled pretrial conferences, failure to prepare, and failure to file the requisite pretrial statements. Sanctions include fees and costs, as well as the dismissals, defaults, and preclusion orders discussed above.[441] One district imposes a fine in such cases.[442] The only other local rule that imposes a fine provides one for failure to follow correct procedure in filing or responding to a motion.[443]

Many districts also provide for failing to file memoranda on motions or failing to appear at motion hearings. Under some rules, the motion will be dealt with summarily or without examination of the record. Under other rules, a failure on the part of the moving party can be treated as a waiver of the motion, a failure on the part of the opposite party as a consent to the motion being granted.[444]

Finally, a number of districts provide that the right to maintain a suit as a class action may be lost unless the plaintiff moves within a specified time (ninety days to six months) for a determination under rule 23(c)(1).[445]

VIII. IMPOSING SANCTIONS ON THE ATTORNEY RATHER THAN ON THE CLIENT

Introduction

In many, if not most, of the cases considered in this report, the attorney's conduct gives rise to sanctions while the sanctions themselves affect only the client. Traditionally, courts treat the attorney as the client's agent, so that the attorney's acts and omissions legally bind the client.[446] If an attorney's conduct "falls below acceptable standards, the client's remedy is a malpractice suit, not a repudiation of the agency relationship."[447]

While the traditional agency theory still holds, many courts are reluctant to impose sanctions on an innocent client for the faults of the attorney.[448] Recently, federal courts have been more willing to disregard the agency theory and impose sanctions on attorneys for their own misconduct.

Agency Theory

The leading case on the agency theory is Link v. Wabash Railroad.[449] The plaintiff in that case brought suit to recover damages for injuries sustained in a collision between his automobile and a train owned by the defendant. Six years later, and after two fixed trial dates had been postponed, the court scheduled a pretrial conference. On the appointed day the attorney for the plaintiff telephoned the judge's chambers and informed the judge's secretary that he would be unable to be present because he was working on papers to be filed with the state supreme court. When the plaintiff's counsel did not appear at the pretrial conference, the judge reviewed the history of the case and in the exercise of the court's inherent power dismissed the action for failure to appear at the pretrial conference and for failure to prosecute.[450]

In a divided opinion, the Supreme Court upheld the dismissal. The Court found no merit in the argument that the dismissal of the claim based on the attorney's unexcused conduct imposes an unjust penalty on the client:[451]

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."[452]

The Court also observed that "keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant,"[453] and added that "if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit of malpractice."[454]

The Supreme Court was divided four to three in Link. Justice Black, dissenting, opposed the indiscriminate application of the rule that clients must suffer for the mistakes of their lawyers. He said that a client should not be penalized for the conduct of his lawyer "unless notice is given to the client himself that such a threat hangs over his head."[455] At least one court has followed Justice Black's suggestion and communicated directly with a party to warn him of the apparent misconduct of his lawyer.[456]

Some commentators feel that agency principles ignore "the practicalities and realities of the lawyer-client relationship."[457] Although the litigant certainly chooses his own counsel, he

> has very few methods of checking upon [the attorney's] competency. When a person is licensed by a state to practice law, it is presumed that he has a certain degree of skill, integrity and knowledge. . . . it is often difficult for the unskilled layman to determine which lawyer is best qualified to handle his case. Nonetheless, clients are forced to make a choice and may be suddenly apprised of the fact that a valuable claim has vanished because of the mistake of their counsel.[458]

Once the client selects a legal representative, it becomes difficult either to supervise or to control the attorney's conduct:

> The law is complex and the plaintiff is usually a layman; as a practical matter, he cannot supervise his attorney . . . . A long period often passes before law suits are tried . . . . It is natural for the plaintiff to assume that his lawyer will take care of his case during this waiting period.[459]

Furthermore, the malpractice remedies available to a party who has been injured by the acts of his attorney are difficult to pursue. The litigant must not only show "that but for the attorney's negligence he would not have lost the suit, but he has also to prove the damages which resulted from such negligence. Therefore, the client is given a remedy which requires that he prove two cases in one . . . ."[460] Moreover, the "attorney may be unable to satisfy the judgment whereas the original defendant could have done so; . . . the prosecution of a malpractice suit . . . would involve additional expense, inconvenience and delay."[461]

Critics of strict agency theory want to relax the rule, not eliminate it entirely. "Mr. Justice Black would apparently protect only the innocent plaintiff. Outright dismissal would probably be justifiable where the plaintiff has participated in his attorney's misconduct."[462] The critics also concede that the "rule that the client is bound by his attorney's neglect is strictly applied where a trial has already been held."[463] However, "the agency rule can probably be relaxed in the dismissal context without too much inefficiency or unfairness to defendants."[464]

Sources of Authority for Sanctions Against Attorneys

Inherent Power

The primary justification for imposing penalties on the lawyer is that he "is first of all an officer of the court. His primary obligation is to the court. When there is a conflict between the interest of the client and his duty as an attorney, the latter must control."[465] The courts have inherent power to supervise and discipline their officers,[466] and attorneys have a duty to cooperate in the efficient running of the court system.[467] By controlling an attorney's conduct, the court fulfills the duty it owes to its own preservation, to members of the general public, and to those members of the profession who do cooperate and are in sympathy with the proper administration of the law.[468]

Contempt

The courts inherently possess the power of contempt and may use it to impose sanctions.[469] This power has been codified in 18 U.S.C. § 401.[470]

The court may compel an attorney to behave with propriety before the court.[471] If the conduct of an attorney in connection with a suit willfully violates accepted standards, the court may treat the misconduct as contemptuous.[472]

Local Court Rules

Only a few courts with local rules provide for the imposition of penalties against attorneys rather than litigants.[473] Even when such rules exist, they are rarely used,[474] possibly because the validity of local rules which discipline attorneys has been questioned.[475] In Gamble v. Pope & Talbot, Inc.,[476] the Third Circuit reversed the imposition of a fine on an attorney who unintentionally failed to file a timely pretrial memorandum, stating that "the district court has not been given authority and possesses no inherent power to fine an attorney who has not been held in contempt nor given a hearing."[477]

A Federal Cost Statute: 28 U.S.C. § 1927

The federal cost statute 28 U.S.C. § 1927[478] provides federal judges with a potential sanction for attorney misconduct. This statute has undergone very little change since its enactment in 1813 and "despite its age, the statute has rarely been employed . . . the statute stands as a tool awaiting use by the federal courts for whom it was designed. The statute is especially commendable because it breaks through the fiction of attorney-client identification and imposes the penalty on the erring attorney."[479] The statute's infrequent application may be due to the fact that three substantial requirements must be met before costs are imposed: 1) a multiplication of proceedings by an attorney; 2) unreasonable and vexatious conduct; and 3) a resulting increase in the cost of proceedings.[480]

Few cases explain the meaning of "multiplication of proceedings."[481] Generally, the "multiplication of proceedings requirement appears to impose an objective test requiring a court to assess the impact of an attorney's improper conduct on the court's process."[482] Costs have been imposed pursuant to the statute "where an attorney unreasonably and vexatiously prolonged the taking of depositions by excessive cross-examination or has unwarrantably obstructed the examination of his client by instructing him not to answer proper questions" and "where counsel for plaintiff have refused to proceed with trial after the case, after three years, was moved to the Ready Day calendar to the knowledge of all concerned."[483]

Although the language requiring "unreasonable and vexatious" conduct is sufficiently ambiguous to include negligent behavior, generally courts have not imposed liability for mere negligence.[484] Before a court will assess costs, the attorney's conduct apparently must be intentional or in reckless disregard of his duties.[485] Courts have defined the sanctionable conduct in terms of "bad faith",[486] "gross carelessness,"[487] or "gross negligence."[488]

Excess costs must also be shown.[489] Generally, costs means costs recoverable by a successful litigant under other applicable principles of law. That is, the only effect of § 1927 is to impose on an attorney costs that would otherwise be imposed on his client.[490] Corollaries to the general rule, developed in the handful of cases under § 1927, are that a party appearing pro se cannot be subjected to liability under § 1927 however vexatiously he conducts himself, and that costs cannot be imposed under § 1927 until the final outcome of the case has been determined.[491] However, the Supreme Court has recently held that where a statute provides for "costs including attorneys' fees" the fees are still not chargeable under § 1927.[492]

While this rule that nothing is chargeable under § 1927 unless it is taxable as costs under some other principle has been criticized in the literature,[493] we have found only one case departing from it. In that case, the District Court for the Western District of Louisiana invoked § 1927 to require an attorney to reimburse the United States for all the per diem and mileage fees paid to jurors in a frivolous case.[494] Another district court that attempted to do the same thing was reversed by the Court of Appeals for the Sixth Circuit.[495]

Rule 37

Courts may also apply sanctions to attorneys under Rule 37. Since the 1970 amendments to the federal rules, a court must address most improprieties in the discovery process with an order imposing "reasonable expenses, including attorney's fees" upon the responsible party or the attorney advising him, unless the court makes an affirmative finding that the conduct or omission in question "was substantially justified or that other circumstances make an award of expenses unjust." Similar provisions appear in rule 37(a)(4), for unsuccessfully either making or resisting a motion to compel discovery; in 37(b), for noncompliance with a court order concerning discovery; and in 37(d), for disregard of deposition notices, interrogatories, or requests for inspection. Rule 26(c) extends the provisions of 37(a)(4) by reference to proceedings on a motion for a protective order. Before 1970, a court could impose expenses in this way only in the case of a successful motion to compel, and then only on an affirmative finding that the position taken with respect to the motion was "without substantial justification."[496]

Some of what the court is required to do under the 1970 amendments could have been done under its inherent powers. For instance, in a 1965 case[497] the attorney had so obstructed the taking of depositions that the court appointed a special master to preside over the rest of the depositions and ordered that all the master's expenses be paid by the offending attorney without reimbursement from his client. In making the order, the court did not refer to any specific authority.

Under the 1970 amendments, attorneys have incurred liability less for deliberate obstruction[498] than for a cavalier attitude toward dates and calendars. Some attorneys came up with excuses at the last minute instead of attending depositions,[499] and one attorney failed to inform a client of the deadlines for answering interrogatories.[500] Under these amendments, willful misconduct is not necessary to make an attorney liable. In one complicated antitrust case, the court summoned the attorneys to a discovery conference, and assessed them jointly for the expenses occasioned by their failure to resolve certain disputes by agreement.[501]

When a court orders payment of expenses in cases covered by the rule 37 provisions, it seems to have absolute discretion in deciding whether the lawyer or the client is to pay, but the criteria for exercising discretion are not at all clear. If it can be established that either the attorney or the client is principally to blame, the one at fault will be the one to pay.[502] When the blame does not clearly fall on one or the other, one case indicates that the client must pay;[503] other cases shed little light on the question.

In some cases in which the court imposes expenses on an attorney, it specifically adds that the attorney cannot seek reimbursement from his client,[504] perhaps to guard against an attorney taking advantage of a retainer contract entitling him to reimbursement for out-of-pocket expenses.

Miscellaneous

An attorney may be disciplined in a number of nonjudicial ways. For example, a "party who is injured by attorney misconduct can bring a damage action for malicious prosecution, false imprisonment, or abuse of process"[505] as well as for malpractice.[506] In addition, local bar associations may bring disciplinary proceedings.[507] One author suggests that attorney misconduct can be eliminated by continuing legal education programs and law school activities.[508]

IX. CONSTITUTIONAL LIMITATIONS ON THE IMPOSITION OF SANCTIONS

Constitutional questions regarding the imposition of sanctions center around the power of the court to render judgment against a party for failing to obey a pretrial discovery order.[509] The landmark case of Hovey v. Elliott[510] established, as a general proposition, that due process is violated when a court renders an adverse judgment against a party without affording him a day in court on the merits of the dispute, solely for the purpose of punishing him for contempt. The lower court in Hovey struck defendant's answer and entered a decree pro confesso against him because he refused to obey an order to pay into court the money which was the subject of the controversy. The Supreme Court found that procedure to be a denial of due process of law and held the judgment void.

On the other hand, Hammond Packing Co. v. Arkansas[511] held that the striking of an answer and consequent entry of a default judgment against a defendant for refusal to obey a discovery order, without bona fide effort to comply, did not violate due process because the sanction was based on the presumption that the refusal was an admission of want of merit in the answer. In the case, the Hammond Packing Company refused to produce books, papers, and witnesses as ordered by the lower court. The court struck the company's answer and granted a default judgment. The Supreme Court affirmed the judgment and found that Hovey was not controlling. The Court stated that Hovey "involved a denial of all right to defend as a mere punishment"; whereas in Hammond, "the striking out of the answer and default was a punishment, but it was only remotely so."[512] In Hammond, the source of the sanction power was said to be "the right to create a presumption flowing from the failure to produce."[513] The court found due process preserved by "the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."[514]

In Societe Internationale v. Rogers,[515] the Supreme Court, noting that the Hammond presumption might fail when there has been a good faith effort to comply with a discovery order, refused to construe rule 37 "to authorize dismissal . . . when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of the petitioner."[516] In Societe Internationale, the lower court had dismissed the action because plaintiff failed to comply with an order to produce documents. Plaintiff had attempted to comply with the order but was unable to do so because, according to Swiss law, which controlled the plaintiff, plaintiff would be subject to criminal liability if it made the disclosure. The Supreme Court noted that the willfulness or good faith of the party does not affect the fact of noncompliance, but that the reasons for noncompliance are relevant in determining "the path which the District Court might follow"[517] in dealing with a failure to comply. The Supreme Court reversed the judgment of dismissal because the failure was due to inability to comply.[518] Societe Internationale holds that "a failure to respond to a court order to produce is a noncompliance and brings Rule 37 into play, even though the failure could not have been avoided in good faith, but . . . the sanction of dismissal cannot be imposed if the failure was due to inability to comply."[519]

Some read the holding of Societe Internationale as limited by its facts, since the case involved 1) extensive efforts to comply with the pretrial discovery order, and 2) the interdiction of the laws of a friendly foreign power.[520] According to this point of view, dismissal may be permitted even without a showing of willfulness despite Societe Internationale;[521] otherwise, the use of preclusion sanctions would be forbidden for innocent conduct, even though substantial harm has been done to the movant.[522] However, the Court's adherence in Societe Internationale to the "presumption" test of Hammond, coupled with its emphasis on "the level of contumacy as a determinant of the harshness of the sanction",[523] clearly indicates that a dismissal or a default judgment for failure to comply with a discovery order is improper unless the circumstances of the noncompliance afford a reasonable basis to presume an admission of want of merit in the claim or defense. As a practical matter, such a reasonable basis exists only when disobedience of the order is willful.[524]

The Supreme Court's recent decision in National Hockey League v. Metropolitan Hockey Club, Inc.[525] supports this conclusion. The plaintiff in that case repeatedly failed to file timely or adequate responses to interrogatories which were necessary to prove plaintiff's claim. The district court dismissed the claim and the Supreme Court affirmed the dismissal. Although the Supreme Court's opinion in National Hockey League emphasized the deterrence function of the rule 37 sanctions, the case offers no support for the theory that dismissal may be appropriate even without a showing of "willfulness, bad faith or any fault"[526] on the part of the plaintiff. The court affirmed dismissal based on a finding "that the extreme sanction of dismissal was appropriate in this case by reason of plaintiff's 'flagrant bad faith'."[527]

The literature, however, does raise one recurring and important doubt as to the precise constitutional limitations enunciated by the Hovey and Societe Internationale cases: Assuming willful refusal to produce material relevant to a particular issue, must a court limit the preclusion or dismissal sanction to that issue or may it apply the sanction to the entire case? If, in the imposition of a sanction, facts are to be taken as established, evidence is to be excluded, or a portion of the case is to be dismissed, and if these are matters which could not be determined on the merits without the evidence which the party has willfully withheld, then the Hammond "presumption," preserved by the Supreme Court in Societe Internationale, applies. On the other hand, if the sanction forecloses an issue that had no connection with the information that the party has withheld, the sanction might well be regarded as unconstitutional punishment under the Hovey rule.[528]

Rule 37 empowers the court "to compel production of evidence by the imposition of reasonable sanctions . . . ."[529] Since the Societe Internationale court emphasized the level of contumacy as a determinant of the harshness of the sanction, one might read the decision to mean simply that a court may not go "beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior."[530] If the Supreme Court explicitly adopts this interpretation--subject to the qualification that the refusal be willful--it will be clear that there is no constitutional requirement that the sanctions be limited to those specific issues to which the material withheld is relevant.[531]

X. CONCLUSION

The typical pattern of sanctioning that emerges from the reported cases is one in which the delay, obfuscation, contumacy, and lame excuses on the part of litigants and their attorneys are tolerated without any measured remedial action until the court is provoked beyond endurance. At that point the court punishes one side or the other with a swift and final termination of the lawsuit by dismissal or default. This "all or nothing" approach to sanctions results in considerable laxity in the day-to-day application of the rules. Attorneys are well aware that sanctions will be imposed only in the most flagrant situations.

It may be that less drastic sanctions are imposed in a substantial number of unreported cases and that these actions result in compliance with the federal rules. Even so, the substantial number of cases we have examined suggest that courts follow the "all or nothing" approach widely enough to undermine the credibility of the federal rules' scheme of increasingly severe sanctions to maintain court control over litigant and attorney behavior.

The available sanctions fall into three levels of severity. The most severe is, of course, dismissal or default judgment, a final determination of the case against the offending party. Somewhat less severe are preclusion orders and citations for contempt. The preclusion order, if it relates to an important matter, tends to lay the case open to summary judgment and, therefore, can be tantamount to dismissal or default. Contempt may be used without affecting the substance of the case, but it is a serious accusation, not suitable for minor or unintentional infractions.

The third level, the imposition of financial penalties, is the only sanction both mild enough and flexible enough to use in day-to-day enforcement of orderly and expeditious litigation. However, except for the limited and problematic 28 U.S.C. § 1927 and a few local rules of questionable validity, courts may provide financial penalties only in discovery situations. These financial sanctions do not extend as far as they might and seem to be used only rarely. These concerns prompt us to end our report with the following specific recommendations:

1. Rules 41(b) and 55 should be amended to provide in non-discovery cases the same range of sanctions that is available in discovery cases under rule 37(b).
2. Consideration should be given to amending rule 37 to provide reimbursement to the government for time spent and costs incurred by the court where similar reimbursement is now available to a party for unnecessary expense incurred. At least two courts have attempted to require payments of this kind under 28 U.S.C. § 1927, but the weight of authority seems to be that they have no power to do so.[532]

3. Consideration should also be given to giving express authorization for the innovative and, in our opinion, useful expedient adopted by the court in one of our cases for dealing with persistent disruptive tactics on the part of counsel responding to discovery.[533] The court appointed a master to supervise the rest of the discovery process, and required the offending lawyer to pay him.

Drafts of amendments to the federal rules to embody these three proposals are appended.

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day-to-day enforcement of orderly and [illegible]

However, except for the limited and problematic 28 U.S.C. § 1927 and a few local rules of questionable validity, courts may provide financial penalties only in discovery situations. These financial sanctions do not extend as far as they might and seem to be used only rarely. These concerns prompt us to end our report with the following specific recommendations:

1. Rules 41(b) and 16 should be amended to provide in non-discovery cases the same range of sanctions that are available in discovery under Rule 37(b).
2. Consideration should be given to amending Rule 11 to provide reimbursement to the [illegible] and [illegible] so to do.

APPENDIX: Drafts of Proposed Amendments to the Federal Rules of Civil Procedure

1. Amendments to rules 41 and 55 to make the same range of sanctions available in nondiscovery cases as in discovery cases:

Add a new subdivision (e) to rule 41 as follows:

> In case of a failure described in subdivision (b) of this rule, the court may, in lieu of dismissing an action or claim, impose on the offending party or his attorney any sanction provided for in rule 37(b).

Add the following new sentence at the end of rule 55(c):

> When setting aside a default or a judgment by default, or in lieu of entering a judgment by default, the court may impose on the defaulting party or his attorney any sanction provided for in rule 37(b).

2. Amendments to rule 37 to provide for reimbursement for the government:

Add the following new sentence at the end of paragraph (4) of rule 37(a):

> In addition to the expenses provided for above, the court may require the nonprevailing party or the attorney advising him or both of them to reimburse the United States for the time spent and costs incurred by the court and its personnel in entertaining the motion.

Add the following new sentence at the end of rule 37(b) and again before the last sentence of rule 37(d):

> In addition to the expenses provided for above, the court may require the party failing to [obey the order] or the attorney advising him or both to reimburse the United States for the time spent and costs incurred by the court and its personnel as a result of the failure.

[In 37(d) the word "act" should be substituted for the bracketed words.]

3. Provision to enable the court to appoint a master to supervise the discovery process:

Add the following new subdivision (g) to rule 37:

> When the court in passing on a motion under this rule or under rule 26(c) finds that a party or attorney has persistently and intentionally disrupted or abused the discovery process, it may in addition to or in lieu of any other order provided for in those rules appoint a master at the expense of the offending party or attorney to supervise all or part of the remaining discovery in the case. The court may delegate to the master any of its powers under rule 26(c) (except the power to award expenses under subdivision (a)(4) of this rule), or under subdivision (a)(2) of this rule, and may empower the master to attend oral depositions and rule on objections as they occur. Rule 30(d) and subdivision (a)(2) of this rule insofar as they permit completing or adjourning the examination before applying for an order shall not apply to deposition taken in the presence of a master so empowered.

FOOTNOTES

1. Fed. R. Civ. P. 37 provides as follows:

Failure to Make Discovery: Sanctions

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order of the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that

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(1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Subpoena of Person in Foreign Country. A subpoena may be issued as provided in Title 28 U.S.C. § 1783, under the circumstances and conditions therein stated.

(f) Expenses Against United States. Except to the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule.

As amended Dec. 29, 1948, eff. Oct. 20, 1949, March 30, 1970, eff. July 1, 1970.

2. Cohn, Federal Discovery: A Survey of Local Rules and Practices in View of Proposed Changes to the Federal Rules, 63 Minn. L. Rev. 253, 254-55 (1979). Extrajudicial discovery operations ease the burden that district courts are experiencing with their increasing caseloads. Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 Harv. L. Rev. 1033, 1045 (1978). The system, however, does not work perfectly. When the discovery rules were revised in 1970, the advisory committee was troubled by the fact that parties too often relied on the courts for solution of discovery problems. Panzer, The New Federal Discovery Rules in Civil Cases, 37 D.C.B.J. 49, 61 (Aug.-Dec., 1970). At present, it appears that there may be more judicial participation in discovery procedures in the future. The proposed amendments to the rules include an addition to rule

26 which would provide for a discovery conference. The conference would be held by the court and would be followed by an order identifying the issues for discovery purposes and establishing a plan and schedule of discovery. The order could also set limits on discovery and determine other matters necessary for management of discovery. See, Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, reprinted in 80 F.R.D. 323 (1979) (hereinafter cited as Revised Preliminary Draft); ABA Section of Litigation, Report of the Special Committee for the Study of Discovery Abuse (1977); Smith, The Concern over Discovery, 28 Drake L. Rev. 51, 61-62 (1978); Schroeder & Frank, The Proposed Changes in the Discovery Rules, 1978 Ariz. St. L.J. 475, 483-86. For suggested means of judicial supervision of the discovery process see, Renfrew, Discovery Sanctions: A Judicial Perspective, 67 Cal. L. Rev. 264, 281 (1979); Pollack, Discovery--Its Abuse and Correction, 80 F.R.D. 219 (1978).

3. Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Colum. L. Rev. 480, 486-87 (1958) (outlines the structure and functioning of rule 37 and points out its drafting and administrative problems, many of which were corrected by the 1970 amendments to the rule); Developments in the Law--Discovery, 74 Harv. L. Rev. 940, 985-91 (1961) (discusses the overall function and importance of discovery and includes a brief consideration of sanctions; outlines rule 37 and examines the due process limitations on discovery sanctions).

4. Fed. R. Civ. P. 37(a)(2); EEOC v. Carter Carburetor, Div. of ACF Industries, 577 F.2d 43 (8th Cir. 1978), cert. denied, 439 U.S. 1081 (1979); Schleper v. Ford Motor Co. Automotive Div., 585 F.2d 1367 (8th Cir. 1978), cert. denied 439 U.S. 1081 (1979); Britt v. Corporacion Peruana De Vapores, 506 F.2d 927 (5th Cir. 1975); Fox v. Studebaker Worthington, Inc., 516 F.2d 989 (8th Cir. 1975); SEC v. Research Automation Corp., 521 F.2d 585 (2d Cir. 1975); Independent Productions Corp. v. Loew's, Inc., 283 F.2d 730 (2d Cir. 1960); Henry v. Sneiders, 490 F.2d 315 (9th Cir.), cert. denied, 491 U.S. 832 (1974); Jones v. Uris Sales Corp., 373 F.2d 644 (2d Cir. 1967); Anderson v. Nixon, 444 F. Supp. 1195 (D.D.C. 1978); United States v. Mensik, 381 F. Supp. 672 (N.D. Ill. 1974); Balistrieri v. Holtzman, 55 F.R.D. 470 (E.D. Wis. 1972) (an oral order is sufficient); SEC v. American Beryllium & Oil Corp., 303 F. Supp. 912 (S.D.N.Y. 1969).

5. Fed. R. Civ. P. 37(a)(4). Houlihan v. Anderson-Stokes, Inc., 78 F.R.D. 232 (D.D.C. 1978).

Rule 37 was revised extensively in 1970 to correct a number of defects and flaws that had arisen in the application of the rule. Comment, Recent Innovations to Pretrial Discovery Sanctions: Rule 37 Reinterpreted, 1959 Duke L.J. 278, 280-82;

Rosenberg, Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 479, 486 (1968).

The 1970 amendments modified rule 37(a)(4) to provide for the awarding of expenses to the prevailing party when an order compelling discovery is made unless the losing party is found to have been substantially justified in his conduct. This reversed the earlier presumption in rule 37(a)(4) under which expenses of bringing the motion were awarded only if the losing party acted without substantial justification. See, Federal Discovery Rules: Effects of the 1970 Amendments, 8 Colum. J. Law & Soc. Prob. 623, 642 (1972).

The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to a motion for a protective order. Fed. R. Civ. P. 26(c).

6. Prior to the 1970 amendments the language of rule 37 interchanged the terms "refusal" and "failure" to make discovery. Since "refusal" connotes intentional abuse and "failure" implies mere omissive noncompliance, a question developed as to whether the imposition of sanctions requires a showing of willful misconduct. The Supreme Court in Societe Internationale v. Rogers, 357 U.S. 197 (1958), concluded that rule 37 showed no design to use the two terms with consistently distinctive meanings. The Court said that "refused" as used in the rule meant simply a failure to comply, and that willfulness was relevant only to the selection of the sanction to be imposed. The 1970 amendments adopted this analysis and substituted "failure" for "refusal" throughout the rule. See, 4A Moore's Federal Practice ¶ 37.01[8] at 37-23 (2d ed. 1948); Proposed 1967 Amendments to the Federal Discovery Rules, 68 Colum. L. Rev. 271, 291 (1968).

7. The 1970 amendments extended the scope of rule 37(b)(2) to provide comprehensively for the enforcement of all the orders for discovery authorized by various rules. It now reaches any order "to provide or permit discovery" including orders issued under rules 37(a) and 35. 4A Moore's Federal Practice ¶ 37.01[8] at 37-25 (2d ed. 1948).

8. Fed. R. Civ. P. 37(b)(2)(A).

9. Fed. R. Civ. P. 37(b)(2)(B).

10. Fed. R. Civ. P. 37(b)(2)(C).

11. Fed. R. Civ. P. 37(b)(2)(D).

12. Fed. R. Civ. P. 37(b).

13. It is generally accepted that both the decision to impose sanctions and the choice of penalties should be left to the trial judge. Federal Discovery Rules: Effects of the 1970

Amendments, *supra* note 5, at 643. This discretion is reflected in the rule's array of available sanctions and in the language of subdivision (b): "the court in which the action is pending *may* make such orders in regard to the failures *as are just*, and *among others* the following . . . " Fed. R. Civ. P. 37(b) (emphasis added).

14. Fed. R. Civ. P. 37(d).

15. *Id.* This provision places the burden on the disobedient party to show that his failure is justified or that special circumstances make an award of expenses unjust. *See generally* Gold, *Controlling Procedural Abuses: The Role of Costs and Inherent Judicial Authority*, 9 Ottawa L. Rev. 44 (1977); McIlvaine, *Compliance by Counsel, A District Judge's Views as to the Means of Insuring Compliance by Counsel with the Pretrial Procedures*, 29 F.R.D. 408 (1962).

16. *See* Fed. R. Civ. P. 37, Advisory Comm. Note, 48 F.R.D. 487, 538-40 (1970).

17. Comment, *Standards for Imposition of Discovery Sanctions*, 27 Maine L. Rev. 247, 249-50 (1975).

18. Fed. R. Civ. P. 37(d) provides that a court may make such orders as are just, including those authorized by 37(b)(2)(A), (B), and (C), which are: 1) deeming facts or matters established in accordance with the other party's claims; 2) prohibiting proof of certain facts or matters; and 3) striking pleading, dismissing claims, or entering default judgment.

19. Other sanctions related to requests for admission under rule 36 will be taken up in our discussion of that rule.

20. Fed. R. Civ. P. 37(f). *See*, Note, *Preferential Treatment of the United States Under Federal Civil Discovery Procedures*, 13 Ga. L. Rev. 550 (1979) (discusses rule 37(f) and discovery abuse by the government).

21. *See, e.g.*, EEOC v. Carter Carburetor, Div. of ACF Industries, Inc., 577 F.2d 43 (8th Cir. 1978), *cert. denied*, 439 U.S. 1081 (1979); Schleper v. Ford Motor Co. Automotive Div., 585 F.2d 1367 (8th Cir. 1978); Britt v. Corporacion Peruana De Vapores, 506 F.2d 927 (5th Cir. 1975); Fox v. Studebaker Worthington, Inc., 516 F.2d 989 (8th Cir. 1975) (a rule 37(a) motion should be filed first; rule 37(d) only for complete failure to respond); SEC v. Research Automation Corp., 521 F.2d 585 (2d Cir. 1975) (rule 37(a) order necessary before sanctions can be imposed, even where the witness at a deposition refused to be sworn and disrupted the proceedings); Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965) (error to impose expenses for failure to answer questions at a deposition because no rule 37(a) motion was

secured); B.F. Goodrich Tire Co. v. Lyster, 328 F.2d 411 (5th Cir. 1964) (informal agreement made between counsel in court treated by trial court as an order); United States v. Mensik, 381 F. Supp. 672 (N.D. Ill. 1974); Balistrieri v. Holtzman, 55 F.R.D. 470 (E.D. Wis. 1972); SEC v. American Beryllium & Oil Corp., 303 F. Supp. 912 (S.D.N.Y. 1969). *Contra* Bell v. Automobile Club of Michigan, 80 F.R.D. 228 (E.D. Mich. 1978) (because defendants' responses to interrogatories concealed material and led plaintiff to believe that the material did not exist, defendants' conduct required the imposition of sanctions even though no prior order requiring more complete answers had been entered); Israel Aircraft Indus. v. Standard Precision, 72 F.R.D. 456 (S.D.N.Y. 1976), *rev'd in part, vacated in part on other grounds*, 559 F.2d 203 (2d Cir. 1977) (plaintiffs dismissed because of failure to disclose releases which were necessary to a fair disposition of the case; trial court held no prior motion or order to compel necessary under the circumstances, but reversed by court of appeals).

22. Charles Labs, Inc. v. Banner, 79 F.R.D. 55 (S.D.N.Y. 1978); Culp v. Devlin, 78 F.R.D. 136 (E.D. Pa. 1978).

23. *See, e.g.*, Britt v. Corporacion Peruana De Vapores, 506 F.2d 927 (5th Cir. 1975); Humble v. Mountain State Const. Co., 441 F.2d 816 (6th Cir. 1971); Butler v. Pettigrew, 409 F.2d 1205 (7th Cir. 1969); Haney v. Woodward and Lothrop, 330 F.2d 940 (4th Cir. 1964) (in which the appellate court thought the trial court had been lenient in imposing a contempt sanction, but did not change the sanction); Craig v. Far West Engineering Co., 265 F.2d 251 (9th Cir.), *cert. denied*, 361 U.S. 816 (1959); Sher v. DeHaven, 199 F.2d 777 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 936 (1953). *But see* Mellon v. Cooper-Jarrett, Inc., 424 F.2d 499 (6th Cir. 1970) (failure to order answers to questions at a deposition reversible error); Du Beau v. Smither and Mayton, Inc., 203 F.2d 395 (D.C. Cir. 1953) (deposition not stricken by trial court; appellate court ordered deposition stricken).

24. 357 U.S. 197 (1958).

25. 357 U.S. at 207. For a detailed discussion of *Societe Internationale v. Rogers*, *see* text accompanying footnotes 515-31.

26. *See, e.g.*, SEC v. Research Automation Corp., 521 F.2d 585 (2d Cir. 1975); Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965); Independent Productions Corp. v. Loew's, Inc., 283 F.2d 730 (2d Cir. 1960). *See also* SEC v. American Beryllium & Oil Corp., 303 F. Supp. 912 (S.D.N.Y. 1969).

27. Citing Societe Internationale v. Rogers, 357 U.S. 197 (1958), for the proposition that rule 37 is the remedy for noncompliance with a production order, the court in Independent Productions Corp. v. Loew's, Inc., 283 F.2d 730 (2d Cir. 1960),

reversed a dismissal of a corporation's complaint. The managing agent of the corporation had claimed his Fifth Amendment privilege and refused to answer questions at a deposition. At a later hearing, the corporation disclaimed the witness as its managing agent. The trial court entertained a motion to dismiss on the grounds that the corporation had failed to appear. The Second Circuit held that the procedures of rule 37 must be followed and that since no rule 37(a) motion had been granted, the dismissal was an abuse of discretion. See also Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965); Jones v. B.C. Christopher & Co., 466 F. Supp. 213 (D. Kan. 1979); SEC v. American Beryllium & Oil Corporation, 303 F. Supp. 912 (S.D.N.Y. 1969).

28. See, e.g., SEC v. Wencke, 577 F.2d 619 (9th Cir.) (answers struck and default judgment entered), cert. denied, 439 U.S. 964 (1978); Molina v. El Paso Independent School Dist., 583 F.2d 213 (5th Cir. 1978) (dismissal); Romari Corp. v. United States, 531 F.2d 1358 (5th Cir. 1976) (dismissal); United States v. Wright Motor Co., Inc., 536 F.2d 1090 (5th Cir. 1976) (dismissal of petition to enforce IRS summons); SEC v. Research Automation Corp., 521 F.2d 585 (2d Cir. 1975) (affirmed default judgment with respect to defendant corporation and reversed as to the individual defendant because a motion to compel was not sought prior to imposition of the default judgment); Stebbins v. State Farm Mutual Auto Ins. Co., 413 F.2d 1100 (D.C. Cir.) (per curiam opinion giving res judicata effect to earlier dismissal), cert. denied, 396 U.S. 895 (1969); United States v. Meyer, 398 F.2d 66 (9th Cir. 1968) (dismissal of action; appellate court modified the judgment by eliminating that portion which struck the declaration of taking and the order for delivery of possession since this was not an appropriate sanction under rule 37); Independent Productions Corp. v. Loew's, Inc., 283 F.2d 730 (2d Cir. 1960) (in which trial court's dismissal was reversed and held by the appellate court to be an abuse of discretion); First Iowa Hydro Electric Co-op v. Iowa-Illinois Gas & Electric Co., 245 F.2d 613 (8th Cir.), cert. denied, 355 U.S. 871 (1957) (dismissal); Costal Plastics, Inc., v. Morgan, Olmstead, Kennedy & Gardner, Inc., 72 F.R.D. 601 (W.D. Pa. 1976) (dismissal); Bramble v. Kleindienst, 357 F. Supp. 1028 (D. Colo. 1973) (dismissal).

29. See Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965) (assessment of expenses on plaintiff's attorney for advising plaintiff not to answer questions at a deposition; reversed on appeal); B.F. Goodrich Tire Co. v. Lyster, 328 F.2d 411 (5th Cir. 1964) (exclusion of deposition from evidence; reversed on appeal); Palma v. Lake Waukomis Development Co., 48 F.R.D. 366 (W.D. Mo. 1970) (defendant's counsel ordered to pay expenses of bringing a motion to compel answers because counsel instructed the witness at a deposition not to answer questions).

30. See Du Beau v. Smither and Mayton, Inc., 203 F.2d 395 (D.C. Cir. 1953) (in which the appellate court ordered a deposi-

tion stricken from the record because the information sought--residence and occupation--was relevant and necessary to test the witness' credibility). See also Mellon v. Cooper-Jarrett, Inc., 424 F.2d 499 (6th Cir. 1970) (in which the appellate court held that failure to obey an order to answer deposition questions relating to a witness' prior felony convictions was reversible error).

Although the decision not to impose a sanction is not a final order and not appealable, appellate courts have considered the question, after a final judgment in the case has been rendered, and they have upheld the trial court's decision not to impose a sanction. See Britt v. Corporacion Peruana De Vapores, 506 F.2d 927 (5th Cir. 1975) (failure to supply requested pictures); Humble v. Mountain State Const. Co., 441 F.2d 816 (6th Cir. 1971); Butler v. Pettigrew, 409 F.2d 1205 (7th Cir. 1969) (alleged failure to answer interrogatories sufficiently); Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686 (2d Cir. 1966) (untimely response to request for admissions).

31. See Molina v. El Paso Independent School Dist., 583 F.2d 213 (5th Cir. 1978) (deposition costs imposed on plaintiff who refused to answer questions even after a court order was issued); Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965) (in which the trial court imposed the expenses of a deposition on an attorney who advised his client not to answer questions; the appellate court reversed the sanction because a motion to compel answers was not secured); Palma v. Lake Waukomis Development Co., 48 F.R.D. 366 (W.D. Mo. 1970) (in which a claim of corporate confidentiality was held to be insufficient justification to refuse to answer questions).

32. See Molina v. El Paso Independent School Dist., 583 F.2d 213 (5th Cir. 1978) (deposition expenses in addition to dismissal); Airtex Corp. v. Shelley Radiant Ceiling Co., 536 F.2d 145 (7th Cir. 1976) (in which it became apparent at the close of trial that plaintiff had not responded fully to interrogatories, and defendant was awarded expenses for the failure); Stillman v. Edmund Scientific Co., 522 F.2d 798 (4th Cir. 1975) (remand for a determination of amount of attorneys' fees to be assessed); Cromaglass Corp. v. Ferm, 344 F. Supp. 924 (M.D. Pa. 1972), appeal dismissed, 500 F.2d 601 (3d Cir. 1974) (in addition to establishing facts and precluding evidence); Bell v. Automobile Club of Michigan, 80 F.R.D. 228 (E.D. Mich. 1978) (in addition to precluding evidence), appeal dismissed without opinion, 601 F.2d 587 (6th Cir.), cert. denied, 442 U.S. 918 (1979); Geronymo v. Joseph Horne Co., 80 F.R.D. 86 (W.D. Pa. 1978); Worley v. Massey-Ferguson, Inc., 79 F.R.D. 534 (N.D. Miss. 1978); Charles Labs, Inc. v. Banner, 79 F.R.D. 55 (S.D.N.Y. 1978); Surg-O-Flex of America, Inc. v. Bergen Brunswig Co., 76 F.R.D. 654 (D. Conn. 1977); Conrad Music v. Modern Distributors, Inc., 433 F. Supp. 269 (C.D. Cal. 1977) (attorneys' fees and costs, in addition to default judgment); Stanziale v. First Nat'l City Bank, 74 F.R.D.

557 (S.D.N.Y. 1977) (plaintiff's attorney required to pay the expenses caused by the failure); United States v. Reserve Mining Co., 412 F. Supp. 705 (D. Minn.), aff'd and remanded, 543 F.2d 1210 (8th Cir. 1976); S.C.M. Societe Commerciale S.P.A. v. Industrial and Commercial Research Corp., 72 F.R.D. 110 (N.D. Tex. 1976) (in which the court also announced it would engage in more vigorous impositions of sanctions in the future); Humphreys Exterminating Co., Inc. v. Poulter, 62 F.R.D. 392 (D. Md. 1974); Hunter v. International Systems & Controls Corp., 56 F.R.D. 617 (W.D. Mo. 1972); Bollard v. Volkswagen of America, 56 F.R.D. 569 (W.D. Mo. 1971) (attorneys' fees and expenses in addition to default judgment); White v. Belonginis, 53 F.R.D 480 (S.D.N.Y. 1971); R. De Bonard & Cie v. S.S. Ionic Coast, 46 F.R.D. 1 (S.D. Tex. 1969) (in which the court gave the plaintiff a choice of sanctions including establishing reasonableness of claims, entering default judgment, and expenses of bringing the motion for sanctions); Parrett v. Ford Motor Co., 52 F.R.D. 120 (W.D. Mo. 1969).

33. See Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.) ($100 a day and incarceration for noncompliance), cert. denied, 409 U.S. 1039 (1972).

34. See Cromaglass Corp. v. Ferm, 344 F. Supp. 924 (M.D. Pa. 1972), appeal dismissed, 500 F.2d 601 (3d Cir. 1974) (assessment of $4,000; also established facts in favor of other party and precluded evidence).

35. See English v. 21st Phoenix Corp., 590 F.2d 723 (8th Cir.), cert. denied, 100 S. Ct. 61 (1979); Cromaglass Corp. v. Ferm, 344 F. Supp. 924 (M.D. Pa. 1972), appeal dismissed, 500 F.2d 601 (3d Cir. 1974); Bell v. Automobile Club of Michigan, 80 F.R.D. 228 (E.D. Mich. 1978), appeal dismissed without opinion, 601 F.2d 587 (6th Cir.), 442 U.S. 918 (1979); Alliance to End Repression v. Rochford, 75 F.R.D. 438 (N.D. Ill. 1976) (allegations established prima facie); Center on Corporate Responsibility, Inc. v. Schultz, 368 F. Supp. 863 (D.D.C. 1973); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), aff'd, 438 F.2d 1187 (3d Cir. 1971); R. De Bonard & Cie v. S.S. Ionic Coast, 46 F.R.D. 1 (S.D. Tex. 1969). See also International Union UAW v. National Right to Work Legal Defense & Educ. Foundation, Inc., 433 F. Supp. 474 (D.D.C. 1977) (in which trial court held facts admitted because of defendant's failure to comply but later granted defendant summary judgment because a law related to plaintiff's claim was held unconstitutional).

36. 75 F.R.D. 438 (N.D. Ill. 1976).

37. Fed. R. Civ. P. 37(b).

38. For cases of evasive or incomplete answers see, e.g.,

Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) (trial court dismissed complaint and entered default judgment on the counterclaim; appellate court reversed both actions stating that the trial judge had abused his discretion) (see note 46 *infra*); Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977) (the trial court ordered complaint stricken; appellate court reinstated the complaint since the imposition of this drastic sanction was an abuse of discretion); Di Gregorio v. First Rediscount Corp., 506 F.2d 781 (3d Cir. 1974) (dismissal, also included failure to answer some interrogatories); Rohauer v. Eastin Phelan Corp., 499 F.2d 120 (8th Cir. 1974) (dismissal); Alliance to End Repression v. Rochford, 75 F.R.D. 438 (N.D. Ill. 1976) (allegations established prima facie); Roberson v. Christoferson, 65 F.R.D. 615 (D.N.D. 1975) (dismissal); Parrett v. Ford Motor Co., 52 F.R.D. 120 (W.D. Mo. 1969). For cases in which there was failure to answer some of the interrogatories *see, e.g.*, Thomas v. United States, 531 F.2d 746 (5th Cir. 1976) (dismissal because some interrogatories were not answered; the appellate court said a lesser sanction would be more appropriate); Familias Unidas v. Briscoe, 544 F.2d 182 (5th Cir. 1976) (dismissal for failure to answer three interrogatories as ordered; the appellate court reversed because there was no evidence of bad faith, and the information was not relevant); Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974) (default judgment; appellate court reversed and remanded for hearing on willfulness); Dunbar v. United States, 502 F.2d 506 (5th Cir. 1974) (dismissal; the appellate court reversed because the information sought was not relevant to the action); Cabales v. United States, 447 F.2d 1358 (2d Cir. 1971) (per curiam); G-K Properties v. Redevelopment Agency of San Jose, 409 F. Supp. 955 (N.D. Cal. 1976); United States v. Reserve Mining Co., 412 F. Supp. 705 (D. Minn.), *aff'd*, 543 F.2d 1210 (8th Cir. 1976); Plant v. Chrysler Corp., 70 F.R.D. 35 (D. Del. 1975); United States v. National Broadcasting Inc., 65 F.R.D. 415 (C.D. Cal. 1974), *appeal dismissed*, 421 U.S. 940 (1975).

39. *See, e.g.*, David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977); Emerick v. Fenick Industries, Inc. (5th Cir. 1976); Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974); Gordon v. Federal Deposit Ins. Corp., 427 F.2d 578 (D.C. Cir. 1970) (in which trial court granted summary judgment for failure to comply with order, the appellate court held that it was not an abuse of discretion to deny defendant a total stay of civil litigation because of pending criminal prosecution involving related matters, but remanded so that trial court could clarify its reasons for refusing to strike requests for admissions and exercise its discretion in determining an appropriate sanction); Robison v. Transamerica Ins. Co., 368 F.2d 37 (10th Cir. 1966) (appellate court held dismissal of complaint to constitute an abuse of discretion when plaintiff was prepared to answer interrogatories and had submitted reason for previous failure).

Abuse will be found when there is a showing of manifest injustice. The harsh sanctions of dismissal and default are generally subject to stricter scrutiny, reflecting the appellate court's attitude that district court judges should use these sanctions only when the punishment fits the crime. Waterman, An Appellate Judge's Approach When Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders, 29 F.R.D. 420 (1962), 38 N.D.L. Rev. 123 (1962), 4A Moore's Federal Practice ¶ 37.08, at 37-112, 37-113 (2d ed. 1948).

Sanctions other than dismissal or default are not "final orders"; they are interlocutory in nature and are reviewable only when an appeal is taken on a final order. A final judgment is rarely reversed because of an action taken during pretrial. Some discovery orders become moot during the course of the proceedings and, therefore, are not subject to review on appeal. Interlocutory orders may be reviewed immediately, however, by writ of mandamus or prohibition, by statutory permissive appeals, and under the collateral order doctrine. Johnston, Appealability and Reviewability of Discovery Orders, 53 Chi. B. Rec. 210 (1972); Waterman, supra, at 422.

40. This policy of accepting reasonable excuses is present in the review of other misconduct. See text accompanying footnotes 64-100, 216-82, 325-31, 341-46.

41. See Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977).

42. See Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) (see note 45 infra); Dunbar v. United States, 502 F.2d 506 (5th Cir. 1974).

43. See Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) (see note 45 infra).

44. See Campbell v. Gerrans, 592 F.2d 1054 (9th Cir. 1979); Thomas v. United States, 531 F.2d 746 (5th Cir. 1976) (in which the government devised a way to secure an automatic dismissal by filing interrogatories framed to oblige the taxpayer either to incriminate himself or be dismissed).

45. See Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974). See also Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) (in which lack of a hearing was one of several factors including: 1) a fire destroyed records; 2) other counsel agreed on extensions; 3) the interrogatories were extensive and requested irrelevant information; 4) counsel's fault was not inquired into; 5) no prejudice resulted from the delay; 6) there was no showing of bad faith; and 7) dismissal was a harsh sanction which led the appellate court to reverse the dismissal for an abuse of discretion).

46. See UAW Locals 1093, 558 and 25 v. National Right to Work Legal Defense & Educ. Foundation, Inc., 590 F.2d 1139 (D.C. Cir. 1978).

47. See Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) (see note 45 supra).

48. Fed. R. Civ. P. 37(d) provides a sanction for the failure to serve a written response to a request for inspection submitted under rule 34. Once a written response has been served, any subsequent failure to allow inspection is treated as a partial failure which is sanctionable only after a rule 37(a) order to compel has been issued.

49. See Henry v. Sneiders, 490 F.2d 315 (9th Cir. 1974), cert. denied, 419 U.S. 832 (1974) (no formal order, but the party was given unequivocal notice before the default judgment was entered); Read v. Ulmer, 308 F.2d 915 (5th Cir. 1962) (in which the trial court did not rule on a motion to permit inspection of a helicopter blade, but rather entered default judgment on liability sua sponte; an interlocutory appeal was certified and the appellate court reversed stating that if a party's failure to produce is due to an inability fostered neither by its own conduct nor by circumstances within its control, then sanctions would be inappropriate, and remanded for a determination on whether the party made a reasonable effort to comply with the discovery request); Fisher v. United States Fidelity and Guaranty Co., 246 F.2d 344 (7th Cir. 1957) (no order was issued; reversed because of the lack of an order).

50. See, e.g., Mertens v. Hummell, 587 F.2d 862 (7th Cir. 1978); Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978); Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978) (reversed because the failure to produce was not so flagrant as to justify the extreme sanction of default judgment), on remand, 445 F. Supp. 1368 (E.D. Va. 1978); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977); Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976); Von Brimer v. Whirlpool Corp., 536 F.2d 838 (9th Cir. 1976), aff'd without opinion, 573 F.2d 1288 (2d Cir. 1977); Local Union No. 251 v. Town Line Sand & Gravel, Inc., 511 F.2d 1198 (1st Cir. 1975); Smith v. Schlesinger, 513 F.2d 462 (D.C. Cir. 1975) (order to produce for an in camera inspection); Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.), cert. denied, 409 U.S. 1039 (1972); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), cert. denied, 405 U.S. 921 (1972); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1971), cert. denied, 414 U.S. 1162 (1974); Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970) (trial court's order precluding plaintiff from introducing into evidence any documents not furnished by certain date reversed by the appellate court because failure to produce due to illness of plaintiff and airline strike); Norman v. Young, 422 F.2d 470 (10th Cir. 1970); McFarland v. Gregory, 425 F.2d 443 (2d Cir. 1970) (trial court's order imposing sanctions reversed and case

remanded for hearing on new amount); United States v. Hayes, 408 F.2d 932 (7th Cir.), *cert. denied*, 396 U.S. 835 (1969); Southern Ry. Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968) (in which trial court's order to produce was held partly invalid; appellate court vacated judgment and remanded for reconsideration of the fine); Diapulse Corp. of America v. Curtis Pub. Co., 374 F.2d 442 (2d Cir. 1967); Jones v. Uris Sales Corp., 373 F.2d 644 (2d Cir. 1967); Sperandeo v. Milk Drivers and Dairy Emp. Union No. 537, 334 F.2d 381 (10th Cir. 1964); TWA Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248 (1965); Von Der Heydt v. Kennedy, 299 F.2d 459 (D.C. Cir.), *cert. denied*, 370 U.S. 916 (1962); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) (reversed and remanded for new trial because trial court exceeded judicial discretion by following an "unnecessarily broad discovery order" with an "undesirable stern sanction"); Von Der Heydt v. Rogers, 251 F.2d 17 (D.C. Cir. 1958); Fischer v. Dover S.S. Co., 218 F.2d 682 (2d Cir. 1955); Geronymo v. Joseph Horne Co., 80 F.R.D. 84 (W.D. Pa. 1978); Socialist Workers Party v. Attorney General of the United States, 458 F. Supp. 895 (S.D.N.Y. 1978), *vacated*, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903, 100 S. Ct. 217 (1979); Surg-O-Flex of America, Inc. v. Bergen Brunswig Co., 76 F.R.D. 654 (D. Conn. 1977); Chesa Int'l, Ltd. v. Fashion Associations, Inc., 425 F. Supp. 234 (S.D.N.Y. 1977); G-K Properties v. Redevelopment Agency of San Jose, 409 F. Supp. 955 (N.D. Cal. 1976); State of Ohio v. Crofters, Inc., 75 F.R.D. 12 (D. Colo. 1977), *aff'd*, 570 F.2d 1370 (10th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978); Perry v. Golub, 74 F.R.D. 360 (N.D. Ala. 1976); Costal Plastics, Inc. v. Morgan, Olmstead, Kennedy & Gardner, Inc., 72 F.R.D. 601 (W.D. Pa. 1976); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976); Charron v. Meaux, 66 F.R.D. 64 (S.D.N.Y. 1975); Black v. Sheraton Corp. of America, 371 F. Supp. 97 (D.D.C. 1974); Von Brimer v. Whirlpool Corp., 362 F. Supp. 1182 (N.D. Cal. 1973), *aff'd without opinion*, 573 F.2d 1288 (2d Cir. 1977); United States v. IBM, 60 F.R.D. 658 (S.D.N.Y.), *appeal dismissed*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974), *cert. denied and appeal dismissed sub nom.* Cravath, Swaine, & Moore v. United States, 416 U.S. 976 (1974); SEC v. American Beryllium & Oil Corp., 303 F. Supp. 912 (S.D.N.Y. 1969).

51. *See, e.g.*, Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976) (failure to fully answer interrogatories); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977) (failure to appear for a deposition); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) (failure to respond to interrogatories); Jones v. Uris Sales Corp., 373 F.2d 644 (2d Cir. 1967) (failure to appear for a deposition and several failures to come prepared for depositions); Von Der Heydt v. Kennedy, 299 F.2d 459 (D.C. Cir.), *cert. denied*, 370 U.S. 916 (1962) (failure

to comply with a court order to answer an interrogatory more fully); Surg-O-Flex of America, Inc. v. Bergen Brunswig Co., 76 F.R.D. 654 (D. Conn. 1977) (late and insufficient responses to interrogatories); Chesa Int'l, Ltd. v. Fashion Associations, Inc., 425 F. Supp. 234 (S.D.N.Y.) (recalcitrance with all discovery requests), *aff'd without opinion*, 473 F.2d 1288 (2d Cir. 1977); G-K Properties v. Redevelopment Agency of San Jose, 409 F. Supp. 955 (N.D. Cal. 1976) (insufficient responses to interrogatories); Costal Plastics, Inc. v. Morgan, Olmstead, Kennedy & Gardner, Inc., 72 F.R.D. 601 (W.D. Pa. 1976) (in which the witness also refused to answer questions at a deposition).

52. *See, e.g.*, Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978); Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978); Henry v. Sneiders, 490 F.2d 315 (9th Cir.), *cert. denied*, 419 U.S. 832 (1974); Norman v. Young, 422 F.2d 470 (10th Cir. 1970); Southern Ry. Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968); Diapulse Corp. of America v. Curtis Pub. Co., 374 F.2d 442 (2d Cir. 1967); Sperandeo v. Milk Drivers and Dairy Emp. Union No. 537, 334 F.2d 381 (10th Cir. 1964); Von Der Heydt v. Rogers, 251 F.2d 17 (D.C. Cir. 1958); Socialist Workers Party v. Attorney General of the United States, 458 F. Supp. 895 (S.D.N.Y. 1978), *vacated on other grounds*, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903, 100 S. Ct. 217 (1979); State of Ohio v. Crofters, Inc., 75 F.R.D. 12 (D. Colo. 1977), *aff'd*, 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978); Perry v. Golub, 74 F.R.D. 360 (N.D. Ala. 1976); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976); Charron v. Meaux, 66 F.R.D. 64 (S.D.N.Y. 1975); Black v. Sheraton Corp. of America, 371 F. Supp. 97 (D.D.C. 1974); United States v. IBM, 60 F.R.D. 658 (S.D.N.Y.), *appeal dismissed*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974), *cert. denied and appeal dismissed sub nom.* Cravath, Swaine, & Moore v. United States, 416 U.S. 976 (1974); Von Brimer v. Whirlpool Corp., 362 F. Supp. 1182 (N.D. Cal. 1973), *aff'd*, 536 F.2d 838, 844 (9th Cir. 1976) (in which production of a crucial exhibit did not come until the day before trial, despite prior representations that production was complete).

53. *See, e.g.*, Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978); Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978); Mertens v. Mummell, 587 F.2d 862 (7th Cir. 1978) (in which plaintiffs claimed that no relevant documents existed or that they were privileged, but plaintiffs offered no written explanation of their position until after a magistrate recommended dismissal); Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020, *on remand*, 445 F. Supp. 1368 (E.D. Va. 1978); Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); Local Union No. 251 v. Town Line Sand & Gravel, Inc., 511 F.2d 1198 (1st Cir. 1975);

Smith v. Schlesinger, 513 F.2d 426 (D.D.C. 1975) (party attempted to condition production); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970) (some but not all the documents produced); United States v. Hayes, 408 F.2d 932 (7th Cir.), *cert. denied*, 396 U.S. 835 (1969) (no documents produced in response to an IRS summons); Diapulse Corp. of America v. Curtis Pub. Co., 374 F.2d 442 (2d Cir. 1967); TWA Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248 (1965); Von Der Heydt v. Kennedy, 299 F.2d 459 (D.C. Cir.), *cert. denied*, 370 U.S. 916 (1962); Craig v. Far West Engineering Co., 265 F.2d 251 (9th Cir.), *cert. denied*, 361 U.S. 816 (1959); Von Der Heydt v. Rogers, 251 F.2d 17 (D.C. Cir. 1958); Fisher v. United States Fidelity & Guaranty Co., 246 F.2d 344 (7th Cir. 1957); Chesa Int'l, Ltd. v. Fashion Associations, Inc., 425 F. Supp. 234 (S.D.N.Y.), *aff'd without opinion*, 573 F.2d 1288 (2d Cir. 1977); G-K Properties v. Redevelopment Agency of San Jose, 409 F. Supp. 955 (N.D. Cal. 1976); Black v. Sheraton Corp. of America, 371 F. Supp. 97 (D.D.C. 1974); State of Ohio v. Crofters, 75 F.R.D. 12 (D. Colo. 1977), *aff'd*, 570 F.2d 1370 (10th Cir. 1977), *cert. denied*, 439 U.S. 833 (1978); Perry v. Golub, 74 F.R.D. 360 (N.D. Ala. 1976); Costal Plastics, Inc. v. Morgan, Olmstead, Kennedy & Gardner, Inc., 72 F.R.D. 601 (W.D. Pa. 1976); United States v. IBM, 60 F.R.D 658 (S.D.N.Y.), *appeal dismissed*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974), *cert. denied and appeal dismissed sub nom.* Cravath, Swaine, & Moore v. United States, 416 U.S. 976 (1974).

54. *See, e.g.*, Norman v. Young, 422 F.2d 470 (10th Cir. 1970) (in which the party supplied wholly worthless and contrived documents); Charron v. Meaux, 66 F.R.D. 64 (S.D.N.Y. 1975) (in which the defendants refused cooperation and also produced irrelevant documents).

55. *See*, McFarland v. Gregory, 425 F.2d 443 (2d Cir. 1970); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976) (in which the recalcitrant party offered to open his files to the requesting party but the court deemed such an offer little more than a gigantic do-it-yourself kit); Harlem River Consumer Co-op, Inc. v. Associated Grocers of Harlem, Inc., 64 F.R.D. 459 (S.D.N.Y. 1974) (in which so much material was produced that it was almost useless to the requesting party, and the court warned that if responsive answers were not given within 20 days it would refuse to consider any documentary evidence covered by the interrogatories; court states that sanctions were warranted but expressed reluctance because the party was a nonprofit corporation and in weak financial condition).

56. *See*, Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978) (expenses of bringing motions to compel); Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.), *cert. denied*, 409 U.S. 1039

(1972) (cost sanctions imposed under standing contempt order); McFarland v. Gregory, 425 F.2d 443 (2d Cir. 1970) (expenses of interpreting data because it was produced in a condition making evaluation difficult); Surg-O-Flex of America, Inc. v. Bergen Brunswig Co., 76 F.R.D. 654 (D. Conn. 1977) (attorneys' fees for motion to compel and motions for sanction); Geronymo v. Joseph Horne Co., 80 F.R.D. 84 (W.D. Pa. 1978) (expenses resulting from failure to obey court order); Chesa Int'l, Ltd. v. Fashion Associations, Inc., 425 F. Supp. 234 (S.D.N.Y.) (expenses on both the recalcitrant party and his attorney), *aff'd without opinion*, 573 F.2d 1288 (2d Cir. 1977); State of Ohio v. Crofters, 75 F.R.D. 12 (D. Colo. 1977), *aff'd*, 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978) (expenses of pursuing discovery on the recalcitrant party); David v. Hooker, 560 F.2d 412 (9th Cir. 1977) (expenses imposed not on a party but rather on the managing agent and sole stockholder). *See also* Fisher v. Marubeni Cotton Corp., 526 F.2d 1338 (8th Cir. 1975) (on a non-party for failure to comply with a subpoena duces tecum; reversed on appeal because not within rule 37).

57. *See* NLRB v. Trans Ocean Export Packing, Inc., 473 F.2d 612 (9th Cir. 1973) (for failure to produce documents in post-judgment proceeding to determine back pay); Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.) ($100 a day for each day of noncompliance), *cert. denied*, 409 U.S. 1039 (1972); Southern Ry. Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968) (in which the appellate court held that the contempt was in the nature of a criminal penalty and hence immediately appealable); Haney v. Woodward & Lothrop, Inc., 330 F.2d 940 (4th Cir. 1964) (in which the manager of a party was held in contempt but the fine was suspended by the trial court); United States v. IBM, 60 F.R.D. 658 (S.D.N.Y.), *appeal dismissed*, 495 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974), *cert. denied and appeal dismissed sub nom.* Cravath, Swaine, & Moore v. United States, 416 U.S. 976, 985 (1974). *See also* Socialist Workers Party v. Attorney General of the United States, 458 F. Supp. 895 (S.D.N.Y. 1978), *vacated*, 596 F.2d 58 (2d Cir. 1979) (mandamus issued because the district court insufficiently considered issue-related sanctions before citing the attorney general for contempt), *cert. denied*, 444 U.S. 903, 100 S. Ct. 217 (1979).

58. *See* Von Brimer v. Whirlpool Corp., 536 F.2d 838 (9th Cir. 1976); Smith v. Schlesinger, 513 F.2d 462 (6th Cir. 1975); Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970); Surg-O-Flex of America, Inc. v. Bergen Brunswig Co., 76 F.R.D. 654 (D. Conn. 1977); Chesa Int'l, Ltd. v. Fashion Associations, Inc., 425 F. Supp. 234 (S.D.N.Y. 1977), *aff'd without opinion*, 573 F.2d 1288 (2d Cir. 1977); State of Ohio v. Crofters, Inc., 75 F.R.D. 12 (D. Colo. 1977), *aff'd*, 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978); SEC v. American Beryllium & Oil Corp., 303 F. Supp. 912 (S.D.N.Y. 1969).

59. *See* Black v. Sheraton Corp. of America, 371 F. Supp. 97 (D.D.C. 1974); Center on Corporate Responsibility v. Schultz, 368 F. Supp. 863 (D.D.C. 1973).

60. *See* Mertens v. Hummell, 587 F.2d 862 (7th Cir. 1978); Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); Diapulse Corp. of America v. Curtis Pub. Co., 374 F.2d 442 (2d Cir. 1967); Sperandeo v. Milk and Dairy Emp. Union No. 537, 334 F.2d 381 (10th Cir. 1964); TWA Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248 (1965) (dismissal involved four counterclaims); Von Der Heydt v. Kennedy, 299 F.2d 459 (D.C. Cir.), *cert. denied*, 370 U.S. 916 (1962); Von Der Heydt v. Rogers, 251 F.2d 17 (D.C. Cir. 1958); Fisher v. U.S. Fidelity & Guaranty Co., 246 F.2d 344 (7th Cir. 1957) (appellate court reversed the dismissal since plaintiff had sold car and could not comply with order to allow insurer to inspect and test it); Geronymo v. Joseph Horne Co., 80 F.R.D. 84 (W.D. Pa. 1978) (defendant moved for dismissal under rule 37 but court granted dismissal citing rule 41(b); see discussion of the exclusiveness of rule 37 as source of sanction power for resisting discovery, at pp. 10-25, 36-40, 60 *infra*); G-K Properties v. Redevelopment Agency of San Jose, 409 F. Supp. 955 (N.D. Cal. 1976); Costal Plastics, Inc. v. Morgan, Olmstead, Kennedy & Gardner, Inc., 72 F.R.D. 601 (W.D. Pa. 1976); Perry v. Golub, 74 F.R.D. 360 (N.D. Ala. 1976).

61. *See* Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977), *cert. denied*, 430 U.S. 1020, *on remand*, 445 F. Supp. 1368 (E.D. Va. 1978) (appellate court reversed since the failure to produce was not so flagrant as to justify the extreme sanction of default judgment); Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); Local Union No. 291 v. Town Line Sand & Gravel, Inc., 511 F.2d 1198 (1st Cir. 1975); Henry v. Sneiders, 490 F.2d 315 (9th Cir. 1973), *cert. denied*, 419 U.S. 832 (1974); Norman v. Young, 422 F.2d 470 (10th Cir. 1970); Jones v. Uris Sales Corp., 373 F.2d 644 (2d Cir. 1967); Read v. Ulmer, 308 F.2d 915 (5th Cir. 1962) (appellate court reversed the default judgment stating that if a party's failure to produce is due to an inability fostered neither by its own conduct nor by circumstances within its control, then sanctions would be inappropriate, and remanded for a determination on whether the party made a reasonable effort to comply with the discovery request); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) (appellate court reversed and found that since good faith refusals were made, judgment of default should not have been entered); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976).

62. *See* Mertens v. Hummell, 587 F.2d 862 (7th Cir. 1978);

Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978); Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978); Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1977); Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 908 (1977); Von Brimer v. Whirlpool Corp., 536 F.2d 838 (9th Cir. 1976); Local Union No. 251 v. Town Line Sand & Gravel, Inc., 511 F.2d 1198 (1st Cir. 1975); Smith v. Schlesinger, 513 F.2d 462 (D.D.C. 1975); Hodgson v. Mahoney, 460 F.2d 326 (1st Cir.), *cert. denied*, 409 U.S. 1039 (1972); Brennan v. Midwestern Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); Norman v. Young, 422 F.2d 470 (10th Cir. 1970); McFarland v. Gregory, 425 F.2d 443 (2d Cir. 1970) (in which the appellate court believed the trial court undoubtedly had good reasons for imposing the sanction, but nevertheless found that a hearing should have been held to determine the size of the award of expenses); United States v. Hayes, 408 F.2d 932 (7th Cir. 1969) (in which the party failed to produce in accordance with an IRS summons); Diapulse Corp. of America v. Curtis Pub. Co., 374 F.2d 442 (2d Cir. 1967); Jones v. Uris Sales Corp., 373 F.2d 644 (2d Cir. 1967); Sperandeo v. Milk Drivers and Dairy Emp. Union No. 537, 334 F.2d 381 (10th Cir. 1964); TWA Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248 (1965); Haney v. Woodward & Lothrop, Inc., 330 F.2d 940 (4th Cir. 1964); Von Der Heydt v. Kennedy, 299 F.2d 459 (D.C. Cir.), *cert. denied*, 370 U.S. 916 (1962).

63. *See In re* Attorney General of the United States, 596 F.2d 58 (2d Cir.), *cert. denied*, 444 U.S. 903, 100 S. Ct. 217 (1979); *In re* Westinghouse Electric Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977) (in which parties made an effort to produce materials not subject to Canadian regulation and sought a waiver from Canadian authorities, sanctions were not proper); Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978), *on remand*, 445 F. Supp. 1368 (E.D. Va. 1978); Fisher v. Marubeni Cotton Corp., 526 F.2d 1338 (8th Cir. 1975) (rule 37 only applies to parties and here a non-party was sanctioned without receiving an opportunity to explain his behavior. Rule 45 might have been used. In this case the trial court misapplied rule 37); Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970) (in which it was unrealistic to require the party to produce all the documents requested, and the party made every good faith effort to comply); Southern Ry. Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968) (in which the contempt sanction was in the nature of a criminal penalty because the party was not given an opportunity to purge his contempt); Read v. Ulmer, 308 F.2d 915 (5th Cir. 1962) (in which the appellate court remanded the case for a determination of whether the party made a good faith effort to comply with the production order); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); Fisher v. United States

Fidelity & Guaranty Co., 246 F.2d 344 (7th Cir. 1957); Von Der Heydt v. Rogers, 251 F.2d 17 (D.C. Cir. 1958) (in which the appellate court did *not* reverse but rather remanded for findings of fact, so that the appellate court would be able to rule).

64. Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970) (in which the inability to produce was not fostered by the party's conduct nor by circumstances within her control, and she made every effort to comply).

65. Geronymo v. Joseph Horne Co., F.R.D. 84 (W.D. Pa. 1978).

66. Fisher v. United States Fidelity & Guaranty Co., 246 F.2d 344 (7th Cir. 1957) (reversed because the item was in the hands of a third person, and no order to produce was made). *See also* Read v. Ulmer, 308 F.2d 915 (5th Cir. 1962) (reversed and remanded for a determination of whether the party made a good faith effort to secure the item from a third party).

67. *See* Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

68. *See* Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978), *on remand*, 445 F. Supp. 1368 (E.D. Va. 1978).

69. Southern Ry. Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968).

70. Fisher v. Marubeni Cotton Corp., 526 F.2d 1338 (8th Cir. 1975).

71. *See, e.g.*, Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978), *on remand*, 445 F. Supp. 1368 (E.D. Va. 1978) (the appellate court reversed since the failure to produce was not so flagrant as to justify the extreme sanction of default judgment); Read v. Ulmer, 308 F.2d 915 (5th Cir. 1962) (appellate court reversed the default judgment since the failure to produce would be justified if it was due to the inability of the party to obtain the demand article) (see note 50, *supra*); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 317 U.S. 955 (1963) (appellate court reversed and found that since good faith refusals were made, judgment of default should not have been entered).

72. Fed. R. Civ. P. 37(d) provides that a court may make any order which is just, including those authorized by 37(b)(2)(A), (B), and (C), which allow the court to: 1) deem facts or matters established in accordance with the other party's claims; 2) prohibit proof of certain facts or matters, and strike pleadings, dismiss claims, or enter default judgment.

The 1970 amendments broadened the array of permissible sanctions under rule 37(d) to include such orders "as are just." This change eliminated any requirement of willful misconduct, and "in view of the possibility of light sanctions even a negligent failure should come with 37(d)." 4A Moore's Federal Practice ¶ 37.01[8] at 37-27 (2d ed. 1948).

73. SEC v. Research Automation Corp., 521 F.2d 585 (2d Cir. 1975) (in which the party appeared but failed to be sworn. The appellate court ruled that the failure to appear provision of rule 37(d) must be strictly construed and reserved for those cases in which the deponent literally fails to appear); SEC v. American Beryllium & Oil Corp., 303 F. Supp. 912 (S.D.N.Y. 1969) (in which the defendant appeared, was sworn, but then refused to answer questions; the court ruled that a rule 37(a) order compelling answers must be secured before a sanction can be imposed). *See also* Fox v. Studebaker Worthington, Inc., 516 F.2d 989 (8th Cir. 1975) (insufficient responses were given to interrogatories and the trial court ordered certain allegations deemed admitted. The appellate court ruled that 37(d) is to be applied only when there is total noncompliance with discovery); First Nat'l Bank of Wash. v. Langley-Howard, Inc., 391 F.2d 207 (3d Cir. 1968). *But cf.* Airtex Corp. v. Shelley Radiant Ceiling Co., 536 F.2d 145 (7th Cir. 1976) (in which it did not become clear until the close of the trial that the plaintiff failed to respond fully to interrogatories, and the appellate court ruled that rule 37(d) does not require a complete failure).

74. *See* note 1, *supra*.

75. *See, e.g.*, Durgin v. Graham, 372 F.2d 130 (5th Cir.), *cert. denied*, 388 U.S. 919 (1967); Interstate Cigar Co. v. Consolidated Cigar Co., 317 F.2d 744 (2d Cir. 1963); Bourgeois v. El Paso Natural Gas Co., 257 F.2d 807 (2d Cir. 1958); Hubbard v. Baltimore & O. R. Co., 249 F.2d 885 (6th Cir. 1957). For district court cases imposing sanctions for failure to appear at a deposition, *see* Philpot v. Philco Ford Corp., 63 F.R.D. 672 (E.D. Pa. 1974); Foss v. Gerstein, 58 F.R.D. 627 (S.D. Fla. 1973).

76. *See* Bonaventure v. Butler, 593 F.2d 625 (5th Cir. 1979) (three failures to appear); Hepperle v. Johnston, 590 F.2d 609 (5th Cir. 1979) (three failures to appear); Anderson v. Airwest, Inc., 542 F.2d 1090 (9th Cir. 1976) (four failures to appear); Atlantic Cape Fisheries v. Hartford Fire Ins. Co., 509 F.2d 577 (1st Cir. 1975) (three failures and several extensions); Rohauer v. Eastin-Phelan Corp., 499 F.2d 120 (8th Cir. 1974); Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir.), *cert. denied*, 400 U.S. 878 (1970); Grace v. Fisher, 355 F.2d 21 (2d Cir. 1966); TWA Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248 (1965); O'Toole v. William J. Meyer Co., 243 F.2d 765 (5th Cir. 1957); Fischer v. Dover S.S. Co., 218 F.2d 682 (2d Cir. 1955).

77. *See, e.g.*, Bonaventure v. Butler, 593 F.2d 625 (5th Cir. 1979) (plaintiff did not appear as ordered on a specified date; suit dismissed); Anderson v. Airwest, Inc., 542 F.2d 1090 (9th Cir. 1976) (default judgment would be entered if the witness did not appear within 45 days); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3 (2d Cir. 1976) (magistrate recommended that defendant be defaulted for further noncompliance, and order issued directing deposition to be completed by date certain); Atlantic Cape Fisheries v. Hartford Fire Ins. Co., 509 F.2d 577 (1st Cir. 1975) (plaintiff to be nonsuited if deposition not taken by date certain); Rohauer v. Eastin-Phelan Corp., 499 F.2d 120 (8th Cir. 1974) (order to appear to complete deposition by date certain followed by an order to show cause why case should not be dismissed); TWA Inc. v. Hughes, 449 F.2d 51 (2d Cir. 1971) (default judgment entered after several warnings), *rev'd on other grounds*, 409 U.S. 363 (1973), *on remand*, 359 F. Supp. 783 (S.D.N.Y. 1973); Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir. 1970), *cert. denied*, 400 U.S. 878 (1970) (several orders to appear for a deposition and delay ruling on motion to enter default judgment; eventually granted); Hastings v. Maritime Overseas Corp., 411 F.2d 1201 (3d Cir. 1969) (order to appear within 60 days or face dismissal); Grace v. Fisher, 355 F.2d 21 (2d Cir. 1966) (order to appear for a deposition and produce documents); Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964) (default judgment would be entered if party failed to appear for medical examination to ascertain whether he was justified in missing deposition; appellate court affirmed the entry of default judgment because party failed to appear), *cert. denied*, 380 U.S. 956 (1965); TWA Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248 (1965); Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957); General Houses, Inc. v. Marloch Mfg. Corp., 239 F.2d 510 (2d Cir. 1956) (order to appear for deposition); Fischer v. Dover S.S. Co., 218 F.2d 682 (2d Cir. 1955) (motion to dismiss would be granted unless plaintiff appeared for deposition by date certain); Roberts v. Norden Div., United Aircraft Corp., 76 F.R.D. 75 (E.D.N.Y. 1977) (dismissal followed disobedience of second order threatening sanctions).

78. Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957).

79. Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974); Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957). *Cf.* Kakuwa v. Sanchez, 498 F.2d 1223 (9th Cir. 1974) (counsel inept in not moving for a protective order).

80. *See, e.g.*, Bon Air Hotel, Inc. v. Time, Inc., 376 F.2d 118 (5th Cir. 1967) (in which the witness had fled and the party made good faith efforts to find him), *cert. denied*, 393 U.S. 859 (1968), *cert. denied*, 393 U.S. 815 (1968); General Houses, Inc. v. Marloch Mfg. Corp., 239 F.2d 510 (2d Cir. 1956) (in which the witnesses were no longer under the control of the plaintiff and

were scattered across the country). Cf. O'Toole v. William J. Meyer Co., 243 F.2d 765 (5th Cir. 1957) (rule 37(b) case in which the defendant had already had an opportunity to depose the plaintiff and counsel made good faith efforts to find him).

81. See Kakuwa v. Sanchez, 498 F.2d 1223 (9th Cir. 1974) (in which the witness had insufficient funds to travel from Tokyo to Guam and counsel had been inept in not moving for a protective order); Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957) (in which the court listed seven factors for reversing a sanction: 1) illness of the witness; 2) travel from Munich to New York presented problems; 3) breakdown in communication between counsel and the witness; 4) American courts are usually tolerant of delay; 5) the delay was chargeable to both parties; 6) the witness became available; and 7) the case should be heard on the merits).

82. Griffin v. Aluminum Co. of America, 564 F.2d 1171 (5th Cir. 1977) (in which the pro se plaintiff in an employment discrimination suit misunderstood the defendant's efforts to depose him).

83. See Miller v. International Paper Co., 408 F.2d 283 (5th Cir. 1969); Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957).

84. For recent exceptions to the almost exclusive use of drastic sanctions see Goodsons and Co. v. National American Corp., 78 F.R.D. 721 (S.D.N.Y. 1978) (in which the defendant was ordered to pay the plaintiff's attorneys' fees resulting from defendant's failure to appear for a deposition as ordered); Szilvassy v. United States, 71 F.R.D. 589 (S.D.N.Y. 1976) (in which the court ordered the plaintiff's counsel to pay the expenses of the defendant in bringing the motion to dismiss). Most cases, however, involve the drastic sanctions. See text and accompanying footnotes 330-39.

85. Fed. R. Civ. P. 37(d) authorizes such orders but we found no opinions relying on the authority to make an order different from those listed to deal with failures to appear for depositions.

86. Cf. McMullen v. Travelers Ins. Co., 278 F.2d 834 (9th Cir.) (in which the trial court established facts in accordance with the claims of the party requesting a physical examination pursuant to rule 35 and then granted summary judgment because the claims were dispositive of the action), cert. denied, 364 U.S. 867 (1960).

87. Von Brimer v. Whirlpool Corp., 536 F.2d 838 (9th Cir. 1976) (in which the trial court excluded an exhibit from evidence because it was not produced until the day before trial in disobedience of an earlier production order, and then dismissed the complaint).

For other cases in which the imposition of lesser sanctions for failures to make discovery proved to be as harsh as the traditional drastic sanctions of dismissal and default judgment, see generally Smith v. Schlesinger, 513 F.2d 462 (D.C. Cir. 1975) (in which the defendant was forbidden to introduce any evidence to contradict the plaintiff's assertions leading to a summary judgment); Cromaglass Corp. v. Ferm, 344 F. Supp. 924 (M.D. Pa. 1972), appeal dismissed, 500 F.2d 601 (3d Cir. 1974) (order precluding the plaintiff from supporting claims or introducing certain matters into evidence); Kahn v. Secretary of HEW, 53 F.R.D. 241 (D. Mass. 1971) (in which the court avoided the rule 55 prohibition against defaults against the government by deeming facts established, leaving no genuine issue as to a material fact and therefore granting summary judgment); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), aff'd, 438 F.2d 1187 (3d Cir. 1971) (in which the court ordered facts presumed and then granted summary judgment); Iaconelli v. Anchor Lines, Ltd., 51 F.R.D. 144 (E.D. Pa. 1970) (court prohibited the third-party plaintiff from introducing any evidence in support of its claim because a 19-month delay in violation of two court orders prevented the third-party defendant from making an adequate investigation of defense).

88. For recent exceptions see Szilvassy v. United States, 71 F.R.D. 589 (S.D.N.Y. 1976) (in which the trial court did not grant a dismissal but instead ordered the plaintiff's counsel to pay the defendant's expenses and attorneys' fees for bringing a motion to dismiss as a result of plaintiff's failure to appear at a deposition, to respond to requests for documents, and to answer interrogatories); Goodsons and Co. v. National American Corp., 78 F.R.D. 721 (S.D.N.Y. 1978) (in which the court ordered the defendant to pay plaintiff's attorneys' fees incurred for a conference necessitated by defendant's failure to appear for a deposition and for the preparation of the motion for costs).

89. Fed. R. Civ. P. 37(d) provides that a court may order such orders as are just, and among them are those in Fed. R. Civ. P. 37(b), which include orders deeming facts or matters established for purposes of the litigation, forbidding proof of certain matters, striking pleadings, dismissing claims, and entering a default judgment. There is also a presumption that a court is to impose expenses caused by a failure unless the court finds that the failure was substantially justified. A failure to respond to interrogatories is not excusable because the discovery sought is objectionable unless the party failing to act has applied for a rule 26(c) protective order.

90. See, e.g., Independent Investor Protective League v. Touche Ross & Co., 542 F.2d 156 (2d Cir. 1976) (complaints of the two plaintiffs dismissed because they made untimely responses and made misrepresentations to opposing counsel); Vac-Air, Inc. v.

John Mohr & Sons, Inc., 471 F.2d 231 (7th Cir. 1973) (default judgment entered because the defendant had not responded to interrogatories; the appellate court reversed stating that the imposition of this particular sanction was too harsh); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971) (twenty-six complaints dismissed for failure to answer interrogatories; the appellate court reversed, finding the drastic remedy applied to be unjustified when a lesser sanction could be imposed), modified on other grounds, 456 F.2d 835, cert. denied, 409 U.S. 848 (1972), later appealed, 507 F.2d 929 (5th Cir. 1975); Linnear v. White, 422 F.2d 864 (7th Cir. 1970) (case dismissed when no response given to interrogatories; the appellate court reversed, stating that the purpose of rule 37 (d) is to secure compliance with the discovery rules not to punish erring parties); Robison v. Transamerica Insurance Co., 368 F.2d 37 (10th Cir. 1966) (complaint dismissed when no response to interrogatories came even after the defendant wrote to the plaintiff asking for answers; the appellate court reversed, finding the dismissal to be unwarranted); Nasser v. Isthmian Lines, 331 F.2d 124 (2d Cir. 1964) (dismissed on motion of the defendant because there was no response to interrogatories and a failure to contest original dismissal motion; appellate court affirmed the trial court's summary judgment in the instant action on res judicata grounds); United States Use of Weston & Brooker Co. v. Continental Casualty Co., 303 F.2d 91 (4th Cir. 1962) (default judgment entered because answers did not come within 30 days and the defendant appeared to be delaying); Brookdale Mill v. Rowley, 238 F.2d 397 (2d Cir. 1956); Capitol Life Ins. Co. v. Rosen, 69 F.R.D. 83 (E.D. Pa. 1975); Philpot v. Philco Ford Corp., 63 F.R.D. 672 (E.D. Pa. 1974); Iaconelli v. Anchor Lines, Ltd., 51 F.R.D. 144 (E.D. Pa. 1970); R. De Bonard & Cie v. S.S. Ionic Coast, 46 F.R.D. 1 (S.D. Tex. 1969).

91. Vac-Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231 (7th Cir. 1973).

92. Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), modified on other grounds, 456 F.2d 835 (5th Cir.), cert. denied, 409 U.S. 848 (1972), later appealed, 507 F.2d 929 (5th Cir. 1975).

93. Robison v. Transamerica Insurance Co., 368 F.2d 37 (10th Cir. 1966).

94. Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), modified on other grounds, 456 F.2d 835 (5th Cir.), cert. denied, 409 U.S. 848 (1972), later appealed, 507 F.2d 929 (5th Cir. 1975) (in which the defendant waited until three years after the action commenced, when those who would answer were difficult to contact, and several long sets of interrogatories were served; a lesser sanction would have been more appropriate); Ralph E. Weeks Co. v. Kearney, 57 F.R.D. 475 (M.D. Pa. 1973) (in which the defendant

did not move to dismiss for failure to respond to interrogatories until the eve of trial; dismissal without prejudice was in order).

95. See Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433 (E.D. Pa. 1978) (plaintiffs precluded from offering any evidence as to matters inquired into by the interrogatories); Cooper v. Califano, 81 F.R.D. 57 (E.D. Pa. 1978) (subject matter of interrogatories deemed established in accordance with plaintiff's contention).

96. See notes 85 and 86 supra; Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433 (E.D. Pa. 1978) (preclusion order entered against plaintiff followed by summary judgment for the defendant).

97. We found only two cases imposing expenses for failure to respond to interrogatories. Addington v. Mid-American Lines, 77 F.R.D. 750 (W.D. Mo. 1978); Szilvassy v. United States, 71 F.R.D. 589 (S.D.N.Y. 1976) (failure to respond to interrogatories coupled with failure to appear for a deposition and for a physical examination).

98. Fed. R. Civ. P. 37(d).

99. Fed. R. Civ. P. 36.

100. See Bradshaw v. Thompson, 454 F.2d 75 (6th Cir.), cert. denied, 409 U.S. 878 (1972).

101. Fed. R. Civ. P. 37(c). There have been recent applications involving the principles of rule 37(c). In one case in which the court held that when the plaintiff partnership denied a series of rule 36 requests relating to the sale of crude oil drilled from the partnership's wells, and it later appeared that there were no reasonable grounds for the dispute, the imposition of costs of making proof on the issues was proper. O'Meara-Sterling v. Mitchell, 299 F.2d 401 (5th Cir. 1962). However, when the defendant denied a request for an admission that the plaintiff's ulcer condition, which developed four years after an accident, was caused by the accident, the court ruled that there were reasonable grounds for denial on the causation question. Leas v. General Motors Corp., 50 F.R.D. 366 (E.D. Wis. 1970). When the defendant answered in sufficient detail and did not actually deny under oath the truth of any fact or document, the court held that the plaintiff should be required to make proof of the matters in the regular course of presenting his case and that rule 37(c) was inapplicable. Criterion Music Corp. v. Tucker, 45 F.R.D. 534 (S.D. Ga. 1968).

102. Water Hammer Arrester Corp. v. Tower, 171 F.2d 877 (7th Cir. 1949); West Ky. Coal Co. v. Walling, 153 F.2d 582 (6th

Cir. 1946); Balistrier v. Holtzman, 55 F.R.D. 470 (E.D. Wis. 1972) (a request for expenses incurred in the bringing of a motion to dismiss inappropriate because a motion to compel discovery was not sought initially, when the plaintiff failed to respond to the request for admissions).

103. In Popeil Bros., Inc. v. Schick Elec. Inc., 516 F.2d 772 (7th Cir. 1975) the court denied expenses allegedly incurred because the plaintiff failed to admit the truth of matters in requests for admission. The defendant claimed that a deposition in Japan was required because of the failure; the appellate court affirmed the denial. *See also* Melanson Co. v. Hupp Corp., 391 F.2d 902 (3d Cir. 1968) (per curiam); Garrison v. Warner Bros. Pictures, 226 F.2d 354 (9th Cir. 1955), *cert. denied*, 350 U.S. 968 (1956); United States v. Classified Parking System, Inc., 213 F.2d 631 (5th Cir. 1954).

104. Chicago Pneumatic Tool Co. v. Ziegler, 151 F.2d 784 (3d Cir. 1945).

105. Fidelity Trust Co. v. Village of Stickney, 129 F.2d 506 (7th Cir. 1942).

106. Tyler State Bank & Trust Co. v. Bullington, 179 F.2d 755 (5th Cir. 1950). *But see* Notes on Advisory Committee on Rules, Subdivision (a), 28 U.S.C.A. Rule 36 (Supp. at 53, 1979).

107. Fed. R. Civ. P. 16 authorizes a judge to direct lawyers to appear for a pretrial conference. At the close of the conference, the judge issues a pretrial order setting forth the actions taken, including the agreements reached, and any limitation of issues. Rule 16 includes no sanction provisions. In searching for the authority and power to enforce rule 16, courts often rely on the sanction provisions of rule 37. Rule 37 is preferred for such purposes rather than rule 41(b) or rule 55 since these rules provide for only one drastic penalty. Because rule 37 does not include standards for choosing pretrial conference sanctions, courts follow two basic guidelines: Courts will not impose the harsher penalties of dismissal or default without a showing of willful noncompliance, and judges prefer to issue conditional orders that provide for dismissal or default only when noncompliance continues. For a discussion of this use of the rule 37 sanctions *see*, Note, *Federal Pre-trial Practice: A Study of Modification and Sanctions*, 51 Geo. L.J. 309 (1963); Note, *Dismissal for Failure to Attend a Pre-trial Conference and the Use of Sanctions at Preparatory Stages of Litigation*, 72 Yale L.J. 819 (1963); Price, *Recent Decisions*, 60 Mich. L. Rev. 223 (1961).

108. *See* Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877 (8th Cir. 1978) (exhibits and testimony excluded because they were not identified prior to trial); Davis v. Marathon Oil

Co., 528 F.2d 395 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (testimony of five witnesses excluded because their names were furnished only three days before trial began); Laclede Gas Co. v. G.W. Warnecke Corp., 78 F.R.D. 502 (E.D. Mo. 1978) (failure to provide list of special damages and expert witnesses resulted in dismissal without prejudice of counterclaim), *aff'd*, 604 F.2d 561 (8th Cir. 1979). In Halverson v. Campbell Soup Co., 374 F.2d 810 (7th Cir. 1967), the trial court precluded the testimony of a key witness because the defendant had known about the witness for some time and had not informed the plaintiff of the witness and therefore surprised the plaintiff at trial. The appellate court held that rule 37 sanctions are inapplicable where the objecting party has neither made use of the discovery procedures nor secured an order. The court held that a trial court has authority apart from rule 37 to deal with surprise and unfair prejudice in a trial, but that the exclusion of the testimony of a key witness was too harsh a sanction. The court suggested a recess to allow further discovery.

109. Associated Radio Services Co. v. Page Airways, Inc., 73 F.R.D. 633 (D. Tex. 1977). The trial court had ordered a conference report. When the report was filed each party filed a separate report in a different format, with different contentions. The plaintiff also failed to comply with a court order to answer interrogatories, and the defendant evidently took a position in opposition to discovery without substantial justification. The court ordered the attorneys to pay the expenses to the opposite party (presumably without recourse to their clients) for failure to comply with a conference report. It also ordered each party to pay the other party the expenses caused by the failures to make discovery.

110. Israel Aircraft Industries, Ltd. v. Standard Precision, 72 F.R.D. 456 (S.D.N.Y. 1976), *rev'd in part, vacated in part*, 559 F.2d 203 (2d Cir. 1977). The trial court noted that normally a sanction must follow a refusal to obey an order and that here there was no order. Nevertheless, the court stated that the rules are flexible and dismissed the case because the plaintiff had failed to disclose the existence of releases during the discovery phase of the litigation and because the court has the power under rule 60(b) to release a party from a judgment for fraud perpetrated upon the court. The appellate court reversed the dismissal since it was improper under rule 37(b) in the absence of an order and unwarranted under rule 37(d), which applies only to complete failure, since plaintiff did appear and testify. In addition, the use of rule 60(b) was found to be unjustified.

111. Quaker Chair Corp. v. Litton Business Systems, 71 F.R.D. 527 (S.D.N.Y. 1976). The court imposed the costs of a motion to compel on the requesting party who won the motion, on the grounds that the requesting party had caused the discovery

problem by not complying with the local rule requiring parties to make an attempt to resolve their differences with regard to discovery before presenting them to court.

112. Fox v. Studebaker Worthington, Inc., 516 F.2d 989 (8th Cir. 1975). The trial court found that the plaintiff's use of electronic eavesdropping devices on the defendant's offices and his subsequent changes of mind during the discovery process regarding that "bugging" were shocking. The plaintiffs who had not actually done the bugging were also tainted and the conduct justified dismissal. The appellate court affirmed the dismissal of one of the claims presented by the plaintiffs.

113. EEOC v. New Enterprise Stone & Lime Co., 74 F.R.D. 628 (W.D. Pa. 1977). The trial court imposed the expenses of the other party's attorney upon the government, for filing a vexatious and unwarranted motion to strike a discovery extension granted by the court. Rule 37(f) provides that, "[e]xcept for the extent permitted by statute, expenses and fees may not be awarded against the United States under this rule." The plaintiff had moved for expenses under rule 37(a)(4) and under 42 U.S.C. § 2000-5(k). 42 U.S.C. § 2000-5(k) provides that, "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." Although the plaintiff had not yet prevailed, the court presumably relied on 42 U.S.C. § 2000-5(k) as authority for overcoming the provision of rule 37(f). In S.C.M. Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110 (N.D. Tex. 1976), the court announced its irritation with the way parties were playing "games" with the discovery process and declared that henceforth, if these practices are at the root of discovery problems or if an attorney is acting unreasonably in any other way, it would liberally impose rule 37 sanctions. The court recognized that discovery is often used vexatiously as a tool to obtain settlements and to discourage plaintiffs with the result that only the wealthy could afford litigation. Because there had been a long series of motions, answers, and requests for extensions in the cases before it, the court ordered the offending party to pay costs of $500 to the opposing party.

114. Rule 37(a)(4) expenses can be imposed on parties or attorneys who make unreasonable discovery demands as well as on those who oppose reasonable demands. Renfrew, supra note 2, at 268.

115. 28 U.S.C. § 1927 (1976).

116. But see Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976) (in which the recalcitrant party offered to

open its files to the requesting party, but the court ruled that that violated its discovery order because it was little more than a gigantic do-it-yourself kit); Harlem River Consumers Co-op, Inc. v. Associated Grocers of Harlem, Inc., 64 F.R.D. 459 (S.D.N.Y. 1974) (in which so much material was turned over that it was useless to the requesting party. The court expressed reluctance to impose sanctions, although they were warranted, because the recalcitrant party was a nonprofit corporation and in a weak financial condition. However, the court warned of sanctions if responsive answers were not given within twenty days).

117. Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Mar. 1978), reprinted in 77 F.R.D. 613 (1978) (a revised draft was issued by the advisory committee in Feb. 1979, reprinted in 80 F.R.D. 323); ABA Section of Litigation, Report of the Special Committee for the Study of Discovery Abuse (Oct. 1977). For a discussion of this proposed amendment see, Cohn, supra note 2, at 291-95; Schroeder & Frank, supra note 2, at 487-90.

118. Fed. R. Civ. P. 26(c) provides that a party may apply for and the court may issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. The court may: 1) prevent the discovery; 2) condition the discovery by method, time, and place; 3) limit the scope of discovery; 4) order that only certain persons be present at discovery; 5) order that a sealed deposition be opened only by court order; 6) order that certain confidential information be kept confidential or limit its disclosure; and 7) order that the parties simultaneously file documents or information in sealed envelopes.

119. Rule 37 was intended to encourage drastic action against those who thwart the discovery process. Comment, supra note 5, at 291. Yet, there appears to be an overall indisposition of the courts to impose sanctions. Federal Discovery Rules: Effects of the 1970 Amendments, supra note 5, at 641. The sanction rules give judges great flexibility. While flexibility allows the court to fit the penalty to the fault, broad discretion also may foster restraint and leniency in the punishment of disobedient parties. Judicial reluctance to vigorously employ sanctions has afforded much latitude to parties intent on impeding litigation. Note, supra note 2, at 1034, 1038.

Commentators have called for more disciplined and uniform administration of the sanctions in order to make the federal rules work. Renfrew, supra note 2; Rosenberg, supra note 3, at 496-97; Federal Discovery Rules: Effects of the 1970 Amendments, supra note 5, at 644. On the other hand, excessive discipline is said to be undesirable. It is recommended that sanction policies follow a middle course allowing both firmness and justice. Comment, supra note 5, at 291.

120. See B.F. Goodrich Tire Co. v. E.H. Lyster, 328 F.2d 411 (5th Cir. 1964) (in which the appellate court weighed the relative fault of the parties and ruled that the order of the trial court to exclude a deposition from evidence was error because greater fault lay with the requesting party, and the unanswered questions were not crucial to the deposition); Ralph E. Weeks Co., Inc. v. Kearney, 57 F.R.D. 475 (M.D. Pa. 1973) (sanction to be applied depends on the culpability of the offending party).

121. See, e.g., In re Liquid Carbonic Truck Drivers Chemical Poisoning Litigation, 580 F.2d 819 (5th Cir. 1978) (dismissal followed plaintiffs' refusal to comply with discovery orders to submit to medical examinations, to file timely and complete answers to interrogatories, to transcribe depositions, and to file witness lists), cert. denied sub nom. Strain v. Turner, 441 U.S. 945 (1979); Ohio v. Arthur Andersen & Co., 570 F.2d 1370 (10th Cir. 1978) (in which the court stated that enforcement of the rules requires sanctions for disobedience of valid court orders), cert. denied, 439 U.S. 833 (1978); Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978) (in which failure to obey the court's order to produce documents was willful and so prejudicial as to warrant dismissal); Von Brimer v. Whirlpool Corp., 536 F.2d 838 (9th Cir. 1976) (in which the trial court found willful failure to comply fully with a court order to produce documents and precluded a crucial document from evidence); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977) (in which the failure to appear for a deposition and to produce documents as ordered by the court supported a finding of willful failure and justified the entering of a default); Local Union No. 251 v. Town Line Sand & Gravel, Inc., 511 F.2d 1198 (1st Cir. 1975) (in which the defendant's obstinacy continued for a period of months, and in which defendant refused to comply with a court order to produce documents); Roberts v. Norden Div., United Aircraft Corp., 76 F.R.D. 75 (E.D.N.Y. 1977) (in which failure to comply with an order to appear for a deposition warranted dismissal in view of plaintiff's gross indifference).

122. Societe Internationale v. Rogers, 357 U.S. 197 (1958). See, e.g., Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978); Atlantic Cape Fisheries v. Hartford Fire Ins. Co., 509 F.2d 577 (1st Cir. 1975); Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D. Mo. 1971); Notes of Advisory Committee on Rules, 42 U.S.C.A. Rule 37 (Supp. at 62, 1979) (which states that the rule was amended to bring it into harmony with the Societe Internationale decision).

123. Societe Internationale v. Rogers, 357 U.S. 197 (1958). See, e.g., Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977) (reversal of dismissal; the record did not show that the failure to comply with the court order was willful or in bad faith), later

appealed, 601 F.2d 1348 (8th Cir. 1979); Familias Unidas v. Briscoe, 544 F.2d 182 (5th Cir. 1976) (willfulness to be taken into account); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977) (in which party failed to appear for depositions or to produce and the record supported a finding of *willful* failure); Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974) (must be a finding of *willful* failure before a default judgment for failure to comply with a court order to answer interrogatories or to appear for a deposition can be imposed). *See* Vac-Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231 (7th Cir. 1973); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); Diapulse Corp. of America v. Curtis Pub. Co., 374 F.2d 442 (2d Cir. 1967); Roberts v. Norden Div., United Aircraft Corp., 76 F.R.D. 75 (E.D.N.Y. 1977) (to determine the proper sanction, the court must look to the reasons behind the failure to comply); Maldonado v. IBM, 62 F.R.D. 203 (D.P.R. 1973) (for harsh sanctions, willfulness is still required); Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D. Mo. 1971).

124. *See* text accompanying footnotes 515-27 *infra*; Note, *Dismissal for Failure to Attend a Pre-trial Conference and the Use of Sanctions at Preparatory Stages of Litigation*, 72 Yale L.J. 819 (1963).

125. *See, e.g.*, General Dynamics v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973) (insufficient answers to interrogatories), *cert. denied*, 414 U.S. 1162 (1974); Norman v. Young, 422 F.2d 470 (10th Cir. 1970) (party supplied worthless and contrived documents); Michigan Window Cleaning Co. v. Martino, 173 F.2d 466 (6th Cir. 1949) (unresponsive answers to interrogatories); Conrad Music v. Modern Distributors, Inc., 433 F. Supp. 269 (C.D. Cal. 1977) (answers to interrogatories unintelligible, nonresponsive, and evasive); Costal Plastics, Inc. v. Morgan, Olmstead, Kennedy & Gardner, Inc., 72 F.R.D. 601 (W.D. Pa. 1976) (evasive pattern at deposition and in objecting to production orders); Gulf Oil Corp. v. Bill's Farm Center, Inc., 52 F.R.D. 114 (W.D. Mo. 1970); Parrett v. Ford Motor Co., 52 F.R.D. 120 (W.D. Mo. 1969).

126. *See, e.g.*, Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978) (defendant requested production of documents four times; the court entered three orders to produce but the plaintiff did not produce the documents until the defendant moved for dismissal); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977) (two years from notice of deposition and first failure to appear and produce until default judgment finally entered); Atlantic Cape Fisheries v. Hartford Fire Ins. Co., 509 F.2d 577 (1st Cir. 1975) (case pending for two years and deposition in May 1973 never conducted; dismissed on Aug. 29, 1974, after several orders to appear disobeyed); Local Union No.

251 v. Town Line Sand & Gravel, Inc., 511 F.2d 1198 (1st Cir. 1975) (refusal to produce documents despite advice by attorney to comply); Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir.) (failure to appear three times without warning), *cert. denied sub nom*. Trefina, A.G. v. United States, 400 U.S. 878 (1970); International Union UAW v. National Right to Work Legal Defense & Educ. Foundation, Inc., 433 F. Supp. 474 (D.D.C. 1977) (continued and willful disregard of orders); Chesa Int'l, Ltd. v. Fashion Associations, Inc., 425 F. Supp. 234 (S.D.N.Y.) ("dilatory, obstructive, and uncooperative behavior on discovery matters"), *aff'd without opinion*, 573 F.2d 1288 (2d Cir. 1977); Humphreys Exterminating Co. v. Poulter, 62 F.R.D. 392 (D. Md. 1974); Hunter v. International Systems and Controls Corp., 56 F.R.D. 617 (W.D. Mo. 1972) (persistent and willful failure to comply with discovery procedures); Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D. Mo. 1971); Iaconelli v. Anchor Lines, Ltd., 51 F.R.D. 144 (E.D. Pa. 1970) (after nineteen months and two court orders, insufficient responses filed).

127. *See, e.g.*, Fox v. Studebaker Worthington, Inc., 516 F.2d 989 (8th Cir. 1975) (in which the plaintiff "bugged" the defendant's offices and later made several contradictory statements at depositions); United States Use of Weston & Brooker Co. v. Continental Cas. Co., 303 F.2d 91 (4th Cir. 1962) (in which court noted defendant's answer denied owing anything for materials supplied to it, but it had admitted owing at least half the amount in a sworn statement and it had delayed thirty-nine days in answering a second set of interrogatories); Bell v. Automobile Club of Michigan, 80 F.R.D. 228 (E.D. Mich. 1978) (in which defendant's responses to interrogatories concealed relevant material and led the plaintiff to believe that the material did not exist), *appeal dismissed without opinion*, 601 F.2d 587 (6th Cir.), *cert. denied*, 442 U.S. 918 (1979); Israel Aircraft Industries v. Standard Precision, 72 F.R.D. 456 (S.D.N.Y. 1976) (in which the plaintiffs made several misleading and inaccurate statements and failed to disclose the existence of releases which were necessary to a fair disposition of the case, resulting in serious interference with the judicial process), *rev'd in part, vacated in part*, 559 F.2d 203 (2d Cir. 1977); Von Brimer v. Whirlpool Corp., 362 F. Supp. 1182 (N.D. Cal. 1973), *aff'd*, 536 F.2d 838 (9th Cir. 1976) (several representations to the opposing party and to the court that production of documents was complete; just before trial important material turned over); Bollard v. Volkswagen of America, Inc., 56 F.R.D. 569 (W.D. Mo. 1971) (filing second set of answers to interrogatories which were substantially different from the first, and subsequent dilatory and unresponsive conduct); Parrett v. Ford Motor Co., 52 F.R.D. 120 (W.D. Mo. 1969) (defendant's answers found false, evasive, and obstructive).

128. *See, e.g.*, Rohauer v. Eastin-Phelan Corp., 499 F.2d 120 (8th Cir. 1974) (in which the party failed to appear for a

deposition as ordered by the court and failed to appear at a hearing to show cause why the case should not be dismissed); Diapulse Corp. v. Curtis Pub. Co., 374 F.2d 442 (2d Cir. 1967) (court ordered production of documents within thirty days, but no documents produced); Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965) (in which the witness failed to appear for a deposition despite several court orders and warnings of default judgment); Haney v. Woodward & Lothrop, Inc., 330 F.2d 940 (4th Cir. 1964) (in which the defendant refused to turn over documents to the court for an *in camera* inspection and was, therefore, held in contempt); First Iowa Hydro Electric Co-op v. Iowa-Illinois Gas & Elec. Co., 245 F.2d 613 (8th Cir.), *cert. denied*, 355 U.S. 871 (1957) (in which the party on several occasions refused to testify at depositions despite orders to comply); International Union UAW v. National Right to Work Legal Defense & Educ. Foundation, Inc., 433 F. Supp. 474 (D.D.C. 1977) (in which the party repeatedly refused to disclose the names of its contributors); G-K Properties v. Redevelopment Agency of San Jose, 409 F. Supp. 955 (N.D. Cal. 1976) (in which the plaintiff never produced documents as the court had ordered); Plant v. Chrysler Corp., 70 F.R.D. 35 (D. Del. 1975) (in which the party refused to answer interrogatories as the court had ordered, despite warnings of dismissal).

129. Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974); Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) (fundamental fairness should require a court to hold a hearing).

130. It is clear that a party which has been diligent in its efforts to comply with discovery requests and court orders should not suffer the imposition of a harsh sanction, although a lesser sanction may be in order. Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970); Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *modified on other grounds*, 456 F.2d 835 (5th Cir.), *cert. denied*, 409 U.S. 848 (1972), *later appealed*, 507 F.2d 929 (5th Cir. 1975). When the failure to comply is not brought about by the party's own conduct nor circumstances within its control, the imposition of a harsh sanction is usually an abuse of discretion. *See, e.g.*, Societe Internationale v. Rogers, 357 U.S. 197 (1958); Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858 (5th Cir. 1970) (unreasonable to expect the plaintiff to keep the receipts of purchase of household items which were damaged during transport by the defendant); Bon Air Hotel, Inc. v. Time, Inc., 376 F.2d 118 (5th Cir. 1967) (plaintiff attempted to find the party to be deposed but was unable to do so, despite the efforts of a professional firm to find him), *cert. denied*, 393 U.S. 859 (1968); Robison v. Transamerica Insurance Co., 368 F.2d 37 (10th Cir. 1966) (materials necessary to answer the interrogatories scattered across the country); Read v. Ulmer, 308 F.2d 915 (5th Cir. 1962) (item to be produced, a helicopter blade, was in the hands and under the control of a third party).

131. The courts have often considered excuses for noncompliance and rejected them when they lack credibility. *See, e.g.*, Local Union No. 251 v. Town Line Sand & Gravel, Inc., 511 F.2d 1198 (1st Cir. 1975) (none of the defendant's arguments warranted extended discussion; default judgment affirmed for willful defiance of a court production order); Diaz v. Southern Drilling Corp., 427 F.2d 1118 (5th Cir.), *cert. denied sub nom.* Trefina, A.G. v. United States, 400 U.S. 878 (1970) (in which after several failures to appear for a deposition and an eventual movement for a default judgment, the defendant filed a medical certificate by a Swiss doctor that the defendant's officer-witness should not undertake any trip of "major importance"; the court ordered the deposition to take place within thirty days and delayed ruling on the motion for default, which was granted at the end of the thirty days); Sapiro v. Hartford Fire Ins. Co., 452 F.2d 215 (7th Cir. 1971) (in which the trial court rejected the excuse that the delay in answering interrogatories was due to an incorrect routing of the answers in the defendant insurance company, declaring that it had lost patience with insurance company delays; the appellate court reversed because dismissal was too harsh a sanction, but taxed the costs of the appeal to the appellant); Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964), *cert. denied*, 380 U.S. 956 (1965) (in which after the defendant's president, who had failed to appear for a deposition, submitted an affidavit from a Utah "naturopath" stating that the president was ill, the court ordered an inquiry into the president's health and warned of a default judgment; default judgment was rendered after counsel stated that the president would not appear for an examination); Producers Releasing Corp. De Cuba v. P.R.C. Pictures, 176 F.2d 93 (2d Cir. 1949) (trial court was skeptical about the truth of the assertion that the plaintiff's president was too ill to be deposed, especially in light of affidavits from the defendant that the president was going to work every day); Surg-O-Flex of America, Inc. v. Bergen Brunswig Co., 76 F.R.D. 654 (D. Conn. 1977) (in which the plaintiff's attorney claimed that repeated failures to answer interrogatories, deficient responses, and failure to produce documents were the result of inexperience and unfamiliarity with the federal rules; the court rejected the explanation and imposed sanctions since the attorney had been a member of the bar for twenty-two years).

132. *See, e.g.*, Vac-Air, Inc. v. John Mohr & Son, Inc., 471 F.2d 231 (7th Cir. 1973) (in which the appellate court noted the attorney's illness and seemed to consider it a mitigating factor, although it did not condone his conduct of the case); Linnear v. White, 422 F.2d 864 (7th Cir. 1970) (in which the attorney who filed the suit died four days later); Producers Releasing Corp. De Cuba v. P.R.C. Pictures, 176 F.2d 93 (2d Cir. 1949) (in which the appellate court modified the dismissal to be without prejudice because there were no statements contradicting the plain

tiff's doctor's contention that the witness to be deposed was too ill to travel).

133. Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) (dismissal reversed). Other factors considered important include: 1) the interrogatories were extensive and contained questions about irrelevant material; 2) opposing counsel seemed to agree to the extensions of time to answer; 3) there was no showing of prejudice caused by the delay; 4) there was no showing of bad faith; 5) the responsibility of counsel should have been assessed; and 6) dismissal is a harsh sanction.

134. See Griffin v. Aluminum Co. of America, 564 F.2d 1171 (5th Cir. 1977) (in which the trial court dismissed the complaint after a single failure of the pro se plaintiff to appear for a deposition; the court of appeals reversed, stating that the district court should have considered the plaintiff's ineptitude when it chose a sanction); Kakuwa v. Sanchez, 498 F.2d 1223 (9th Cir. 1974) (trial court should have ordered a different procedure for the taking of interrogatories; counsel was inept but not contumacious); Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974) (in which there was evidence that counsel had not informed the defendants of crucial orders and the appellate court ruled that a hearing should have been held to determine whether the conduct was willful); Geronymo v. Joseph Horne Co., 80 F.R.D. 86 (W.D. Pa. 1978) (judgment of dismissal vacated because plaintiff's counsel was inexperienced and defendants were not prejudiced).

135. See Sapiro v. Hartford Fire Insurance Co., 452 F.2d 215 (7th Cir. 1971) (an additional factor was that the failure took place over an extended holiday weekend).

136. See Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971) (requesting party was dilatory and interrogatories were extensive; lesser sanctions would have been more appropriate than a dismissal), modified, 456 F.2d 835 (5th Cir.), cert. denied, 405 U.S. 848 (1972), later appealed, 507 F.2d 929 (5th Cir. 1975); B.F. Goodrich Tire Co. v. Lyster, 328 F.2d 411 (5th Cir. 1964) (in which the greater fault lay with the plaintiff for not correcting a misconception of the defendant regarding prior inconsistent statements, and the requested answers were not crucial to the deposition).

137. United States v. Wright Motor Co., Inc., 536 F.2d 1090 (5th Cir. 1976) (in which IRS agent served summons upon defendant for the purpose of investigating his personal tax liability and trial court ordered government to answer whether the summons was issued for criminal prosecution; appellate court affirmed the dismissal because the government's failure to answer was a willful refusal to obey court order without excuse). See also Dunbar v. United States, 502 F.2d 506 (5th Cir. 1974) (in which the

government may have been using discovery to pursue possible criminal violations); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963) (in which trial court entered default judgment because IRS agent refused order to produce his reports on investigation of plaintiff for tax fraud; appellate court reversed stating that an open invitation should not be extended to taxpayers to subvert the civil rules into a device for obtaining pretrial discovery against the government in criminal proceedings); Gordon v. F.D.I.C., 427 F.2d 578 (D.C. Cir. 1970) (in which the appellate court remanded the case for a clarification of reasons why the trial court had refused to strike requests for admissions. The court noted that although the admissions, if they were made, could not be used as ammunition in a criminal case, they could be used as leads or in confirmation of the government's position. The court stated that lesser sanctions, such as staying the proceedings, might have been more appropriate).

138. Familias Unidas v. Briscoe, 544 F.2d 182 (5th Cir. 1976); Dunbar v. United States, 502 F.2d 506 (5th Cir. 1974). See also Edgar v. Slaughter, 548 F.2d 770, 771 n.1 (8th Cir. 1977) (in which the court stated that much of the material requested was irrelevant and that this kind of discovery abuse should be stopped). Under proposed rule 37(e) (see text accompanying footnote 116, supra) requests for clearly irrelevant material could result in imposition of sanctions on the requesting party for abuse of the discovery process.

139. Caparelli v. Proceeds of Freight, 390 F. Supp. 1351 (S.D.N.Y. 1974).

140. See Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977); Humble v. Mountain State Const. Co., 441 F.2d 816 (6th Cir. 1971); Geronymo v. Joseph Horne Co., 80 F.R.D. 86 (W.D. Pa. 1978); George and Anna Portes Cancer Prevention Center of Chicago, Inc. v. Inexico Oil Co., 76 F.R.D. 216 (W.D. La. 1977).

141. See In re Liquid Carbonic Truck Drivers Chemical Poisoning Litigation, 580 F.2d 819 (5th Cir. 1978), cert. denied sub nom. Strain v. Turner, 441 U.S. 945 (1979); Denton v. Mr. Swiss of Missouri, Inc., 564 F.2d 236 (8th Cir. 1977); TWA Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964), cert. dismissed, 380 U.S. 248 (1965); International Union UAW v. National Right to Work Legal Defense & Educ. Foundation, Inc., 433 F. Supp. 474 (D.D.C. 1977); Humphreys Exterminating Co. v. Poulter, 62 F.R.D. 392 (D. Md. 1974); Du Beau v. Smither and Mayton, Inc., 203 F.2d 395 (D.C. Cir. 1953).

142. Alliance to End Repression v. Rochford, 75 F.R.D. 438 (N.D. Ill. 1976).

143. See National Hockey League v. Metropolitan Hockey

Club, Inc., 427 U.S. 639 (1976); Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978); Dellums v. Powell, 566 F.2d 231 (D.C. Cir. 1977); Denton v. Mr. Swiss of Missouri, Inc., 564 F.2d 236 (8th Cir. 1977); Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977), *later appealed*, 601 F.2d 1348 (8th Cir. 1979); Affanato v. Merrill Bros., 547 F.2d 138 (1st Cir. 1977); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); Anderson v. Air West, Inc., 542 F.2d 1090 (9th Cir. 1976); Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976); Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433 (E.D. Pa. 1978); Bell v. Automobile Club of Michigan, 80 F.R.D. 228 (E.D. Mich. 1978), *appeal dismissed without opinion*, 601 F.2d 587 (6th Cir.), *cert. denied*, 442 U.S. 918 (1979); Molinaro v. American Telephone & Telegraph Co., 460 F. Supp. 673 (E.D. Pa. 1978); Goodsons and Co. v. National Am. Corp., 78 F.R.D. 721 (S.D.N.Y. 1978); Roberts v. Norden Div., United Aircraft Corp., 76 F.R.D. 75 (E.D.N.Y. 1977); Surg-O-Flex of America, Inc. v. Bergen Brunswig Co., 76 F.R.D. 654 (D. Conn. 1977); State of Ohio v. Crofters, Inc., 75 F.R.D. 12 (D. Colo. 1977), *aff'd*, 570 F.2d 1370 (10th Cir.) *cert. denied*, 439 U.S. 833 (1978); G-K Properties v. Redevelopment Agency of San Jose, 409 F. Supp. 955 (N.D. Cal. 1976); Perry v. Golub, 74 F.R.D. 360 (N.D. Ala. 1976); Costal Plastics, Inc. v. Morgan, Olmstead, Kennedy & Gardner, Inc., 72 F.R.D. 601 (W.D. Pa. 1976); Allied Artists Pictures Corp. v. Giroux, 50 F.R.D. 151 (S.D.N.Y. 1970).

144. This appears to be a fairly common practice. *See, e.g.*, Romari Corp. v. United States, 531 F.2d 296 (5th Cir. 1976) (order dismissing the complaint unless testimony was provided within ten days); Dunbar v. United States, 502 F.2d 506 (5th Cir. 1974) (in which there was an order to compel under pain of dismissal); Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974) (in which there was an order striking the defendant's answer unless responses were provided within twenty days); General Dynamics v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974) (in which there was an order to comply within twenty days or defenses and counterclaims would be stricken); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972) (in which the judge stated that he would dismiss unless responses to interrogatories were filed within twenty days); Hastings v. Maritime Overseas Corp., 411 F.2d 1201 (3d Cir. 1969) (in which there was an order to appear within sixty days or face dismissal); Norman v. Young, 422 F.2d 470 (10th Cir. 1970) (in which the trial court ordered production of documents within seven days and warned of default judgment if production was not forthcoming); Jones v. Uris Sales Corp., 373 F.2d 644 (2d Cir. 1967) (in which the trial court ordered production within twenty-four hours or appropriate relief would be granted); Pioche Mines Consol., Inc. v. Dolman, 333 F.2d 257 (9th Cir. 1964) (in which the trial court ordered that if the

defendant did not appear for an examination, it would strike pleadings and enter judgment against defendant), *cert. denied*, 380 U.S. 956 (1965); Surg-O-Flex of America, Inc. v. Bergen Brunswig Co., 76 F.R.D. 654 (D. Conn. 1977) (plaintiff given four weeks to comply with the discovery orders or the complaint would be dismissed); Brown v. Ames, 346 F. Supp. 1176 (D. Minn. 1972); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976) (in which the trial court entered default judgment, but conditioned removal upon full compliance with its discovery order within two months); Charron v. Meaux, 66 F.R.D. 64 (S.D.N.Y. 1975) (in which the court ordered production within twenty days and payment of attorneys' fees and costs, or answers would be stricken for failure to comply); Harlem River Consumers Co-op, Inc. v. Associated Grocers of Harlem, Inc., 64 F.R.D. 459 (S.D.N.Y. 1974) (in which the court ordered specific answers within twenty days, or it would refuse to consider any documentary evidence on the issues covered by the interrogatories).

145. Robison v. Transamerica Insurance Co., 368 F.2d 37, 39 (10th Cir. 1966).

146. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976) ("the most severe in the spectrum of sanctions . . . must be available, not merely so to penalize those whose conduct may be deemed to warrant such a sanction, but to deter . . . .").

147. *See, e.g.*, Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977), *later appealed*, 601 F.2d 1348 (8th Cir. 1979); Baker v. F.&F. Investors, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); Bon Air Hotel, Inc. v. Time, Inc., 376 F.2d 118 (5th Cir. 1967), *cert. denied*, 393 U.S. 859 (1968); Robison v. Transamerica Insurance Co., 368 F.2d 37 (10th Cir. 1966); Patterson v. C.I.T. Corp., 352 F.2d 333 (10th Cir. 1965); Read v. Ulmer, 308 F.2d 915 (5th Cir. 1962); Fisher v. United States Fidelity & Guaranty Co., 246 F.2d 344 (7th Cir. 1957); United States v. Costello, 222 F.2d 656 (2d Cir.), *cert. denied*, 350 U.S. 847 (1955). The 1970 amendments to rule 37 changed the title from "Refusal to Make Discovery: Consequences" to "Failure to Make Discovery: Sanctions."

148. Nasser v. Isthmian Lines, 331 F.2d 124 (2d Cir. 1964).

149. G-K Properties v. Redevelopment Agency of San Jose, 409 F. Supp. 955 (N.D. Cal. 1976).

150. *See* text accompanying footnotes 446-64 *infra*.

151. Underwood v. Maloney, 16 F.R.D. 3 (E.D. Pa. 1954), *cert. denied*, 358 U.S. 864 (1958).

152. Price, *supra* note 107, at 227-28.

153. Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977); Flaks v. Koegel, 504 F.2d 702 (2d Cir. 1974).

154. Gold, supra note 15, at 84.

155. Note, Civil Procedure--Power of Federal Courts to Discipline Attorneys for Delay in Pre-Trial Procedure, 38 Notre Dame Lawyer 158 (1963).

156. Vac-Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231 (7th Cir. 1973).

157. Gold, supra note 15, at 56. One federal judge has written favorably about the effectiveness of monetary sanctions, and it seems that attorneys in his district would prefer to pay costs rather than have the case dismissed. Usually, the lawyer pays the penalty to the opposing party, but often the court directs that the payment be made to the court's library fund. The amount of the penalty is based on the attorney's familiarity with the court's procedures and the attorney's history of prior abuses. McIlvaine, supra note 15, at 411.

158. Note, supra note 155, at 166. American courts imposed costs on an attorney as early as the nineteenth century, and only a few cases have ever questioned the court's authority to impose costs on an attorney. Id. at 166-67.

159. Id. at 166.

160. See, Ogletree v. Keebler Co., 78 F.R.D. 661 (N.D. Ga. 1978); Chesa Int'l, Ltd. v. Fashion Associations, Inc., 425 F. Supp. 234 (S.D.N.Y.), aff'd without opinion, 573 F.2d 1288 (2d Cir. 1977); Stanziale v. First Nat'l City Bank, 74 F.R.D. 557 (S.D.N.Y. 1977); Associated Radio Services Co. v. Page Airways, 73 F.R.D. 633 (N.D. Tex. 1977); Szilvassy v. United States, 71 F.R.D. 589 (S.D.N.Y. 1976).

Fed. R. Civ. P. 37 includes provisions for imposing costs on attorneys. Rule 37(a)(4) states that the court shall require the person losing a 37(a) motion or the attorney advising that person, or both, to pay to the winning party the reasonable expenses incurred in winning the motion, including attorneys' fees, unless the court finds that the position of the losing party was substantially justified or that other circumstances make an award of expenses unjust. Fed. R. Civ. P. 26(c) makes the provisions of rule 37(a)(4) applicable to the award of expenses incurred in relation to a motion for a protective order. Rules 37(b) and (d) contain language similar to that in 37(a)(4).

161. Humphreys Exterminating Co. v. Poulter, 62 F.R.D. 392 (D. Md. 1974).

162. Note, supra note 2, at 1034.

163. 427 U.S. 639, 643 (1976).

164. *In re* Professional Hockey Antitrust Litigation, 63 F.R.D. 641, 656 (E.D. Pa. 1974), *rev'd*, 531 F.2d 1188 (3d Cir. 1976), *rev'd*, 427 U.S. 639 (1976).

165. *Id.*

166. *Id.*

167. *Id.* at 1194-95.

168. 427 U.S. at 642.

169. *Id.* at 643.

170. *Id.* This language was recently reaffirmed by the Supreme Court in Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

171. Note, *supra* note 2, at 1047-48.

172. *See, e.g.*, Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978); Dellums v. Powell, 566 F.2d 231 (D.C. Cir. 1977); Molinaro v. American Telephone & Telegraph Co., 460 F. Supp. 673 (E.D. Pa. 1978); Roberts v. Norden Div., United Aircraft Corp., 76 F.R.D. 75 (E.D.N.Y. 1977).

173. *See, e.g.*, Bell v. Automobile Club of Michigan, 80 F.R.D. 228 (E.D. Mich. 1978), *appeal dismissed without question*, 601 F.2d 587 (6th Cir.), *cert. denied*, 442 U.S. 918 (1979); Goodsons & Co. v. National Am. Corp., 78 F.R.D. 721 (S.D.N.Y. 1978); State of Ohio v. Crofters, 75 F.R.D. 12 (D. Colo. 1977), *aff'd*, 570 F.2d 1370 (10th Cir. 1978), *cert. denied*, 439 U.S. 833 (1978); Surg-O-Flex of America, Inc. v. Bergen Brunswig Co., 76 F.R.D. 654 (D. Conn. 1977).

174. *See, e.g.*, Bell v. Automobile Club of Michigan, 80 F.R.D. 228 (E.D. Mich. 1978), *appeal dismissed without opinion*, 601 F.2d 587 (6th Cir.), *cert. denied*, 442 U.S. 918 (1979); Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433 (E.D. Pa. 1978); State of Ohio v. Crofters, 75 F.R.D. 12 (D. Colo. 1977), *aff'd*, 570 F.2d 1370 (10th Cir.), *cert. denied*, 439 U.S. 833 (1978).

175. *See*, Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978); Dellums v. Powell, 566 F.2d 231, 235-36 (D.C. Cir. 1977); Denton v. Mr. Swiss of Missouri, Inc., 564 F.2d 236, 240-41 (8th Cir. 1977); Kropp v. Ziebarth, 557 F.2d 142, 146 n.9 (8th Cir. 1977), *later appealed*, 601 F.2d 1348 (8th Cir. 1979); Affanato v. Merrill Bros., 547 F.2d 138, 140-41 (1st Cir. 1977); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto

Rico, Inc., 543 F.2d 3, 6 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); Anderson v. Air West, Inc., 542 F.2d 1090, 1093 (9th Cir. 1976); Emerick v. Fenick Industries, Inc., 539 F.2d 1379, 1381 (5th Cir. 1976); Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp., 80 F.R.D. 433 (E.D. Pa. 1978); Bell v. Automobile Club of Michigan, 80 F.R.D. 228 (E.D. Mich. 1978), *appeal dismissed without opinion*, 601 F.2d 587 (6th Cir.), *cert. denied*, 442 U.S. 918 (1979); Molinaro v. American Telephone & Telegraph Co., 460 F. Supp. 673 (E.D. Pa. 1978); Goodsons & Co. v. National Am. Corp., 78 F.R.D. 721 (S.D.N.Y. 1978); Roberts v. Norden Div., United Aircraft Corp., 76 F.R.D. 75 (E.D.N.Y. 1977); Surg-O-Flex of America, Inc. v. Bergen Brunswig Co., 76 F.R.D. 654 (D. Conn. 1977); State of Ohio v. Crofters, 75 F.R.D. 12, 15 (D. Colo. 1977), *aff'd*, 570 F.2d 1370 (10th Cir.), *cert. denied*, 493 U.S. 833 (1978); G-K Properties v. Redevelopment Agency of San Jose, 409 F. Supp. 955, 959 (N.D. Cal. 1976); Perry v. Golub, 74 F.R.D. 360, 366-67 (N.D. Ala. 1976); Costal Plastics, Inc. v. Morgan, Olmstead, Kennedy & Gardner, Inc., 72 F.R.D. 601, 604-05 (W.D. Pa. 1976); Allied Artists Pictures Corp. v. Giroux, 50 F.R.D. 151 (S.D.N.Y. 1970).

176. E.S. Epstein, C.T. Corcoran, F.M. Krieger, & W.B. Carr, *An Up-Date on Rule 37 Sanctions After National Hockey League v. Metropolitan Hockey Club, Inc.*, 84 F.R.D. 145, 169-71 (1980).

177. Fed. R. Civ. P. 41. Since the focus of this paper is the application of sanctions for misconduct during the course of a lawsuit, some types of dismissals were excluded from the research and are not discussed in this section. Although rule 41(b) provides for dismissal for failure to comply with the federal rules, only those violations which can be characterized as misbehavior, rather than technical failings, are examined. For example, dismissals on what may broadly be termed jurisdictional grounds (including failure to state a claim upon which relief can be granted as well as lack of personal jurisdiction) are not generally considered; however, dismissal for failure to effect timely service of process is discussed, while dismissals for improper service under rule 4 are not treated. The rule provides as follows:

> Dismissal of Actions
> (a) Voluntary Dismissal: Effect Thereof.
> (1) *By Plaintiff; by Stipulation*. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the

merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

178. Fed. R. Civ. P. 41(a)(2).

179. Involuntary dismissal is designed to prevent unnecessary delay, to avoid overcrowding in the courts, to encourage diligent legal preparation of cases, and to assure efficient

administration of the judicial process. Annot., 20 A.L.R. Fed. 488, 494 (1974).

180. Comment, *Involuntary Dismissal for Disobedience or Delay: The Plaintiff's Plight*, 34 U. Chi. L. Rev. 922, 924 (1967). *See generally* Annot., 15 A.L.R. Fed. 407 (1973).

181. In Link v. Wabash Railroad Co., 370 U.S. 626, 630-31 (1962), the court stated:

> Petitioner contends that the language of this Rule, by negative implication, prohibits involuntary dismissals for failure of the plaintiff to prosecute except upon motion by the defendant. In the present case there was no such motion.
>
> We do not read Rule 41(b) as implying any such restriction . . . . The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases . . . . It would require a much clearer expression of purpose than Rule 41(b) to abrogate so well-acknowledged a proposition.

See, e.g., Petty v. Manpower, Inc., 591 F.2d 615 (10th Cir. 1979); Marshall v. Sielaff, 492 F.2d 917 (3d Cir. 1974); Provenza v. H.&W. Wrecking Co., 424 F.2d 629 (5th Cir. 1970) (per curiam); Hyler v. Reynolds Metal Co., 434 F.2d 1064 (5th Cir. 1970), *cert. denied*, 403 U.S. 912 (1971); Montgomery v. Commissioner, 367 F.2d 917 (9th Cir. 1966); Taub v. Hale, 355 F.2d 201 (2d Cir.), *cert. denied*, 384 U.S. 1007 (1966); Marshall v. Southern Farm Bureau Cas. Co., 353 F.2d 737 (5th Cir. 1965), *cert. denied*, 384 U.S. 910 (1966); Grunewald v. Missouri Pac. R. Co., 331 F.2d 983 (8th Cir. 1964); Sandee Mfg. Co. v. Rohm & Haas Co., 298 F.2d 41 (7th Cir. 1962); Slavitt v. Meader, 278 F.2d 276 (D.C. Cir.), *cert. denied*, 364 U.S. 831 (1960); Darlington v. Studebaker-Packard Corp., 261 F.2d 903 (7th Cir.), *cert. denied*, 359 U.S. 992 (1959); Reid v. Prentice Hall, Inc., 261 F.2d 700 (6th Cir. 1958); Boling v. United States, 231 F.2d 926 (9th Cir. 1956); Shotkin v. Westinghouse Electric & Mfg. Co., 169 F.2d 825 (10th Cir. 1948); Charles Labs, Inc. v. Banner, 79 F.R.D. 55 (S.D.N.Y. 1978); Gardner v. Benton, 452 F. Supp. 170 (E.D. Okla. 1977); United States v. Richlyn Laboratories, Inc., 365 F. Supp. 805 (E.D. Pa. 1973).

182. Fed. R. Civ. P. 41(c).

183. Fed. R. Civ. P. 41(d).

184. Zaegel v. Public Finance Co., 79 F.R.D. 58 (E.D. Mo. 1978).

185. Fed. R. Civ. P. 41(b) provides that "[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

See Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978); Weston Funding Corp. v. Lafayette Towers, Inc., 410 F. Supp. 980 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 710 (2d Cir. 1977).

At least one member of the judiciary believes that a dismissal under 41(b) should be without prejudice if possible since a dismissal with prejudice is too drastic a sanction for a calendar infraction or failure to prosecute seasonably. Waterman, *supra* note 39, at 425-26.

Even though rule 41(b) vests district courts with wide discretion in the determination of when dismissal should be entered, many district courts have adopted local rules to supplement the general provision. The legal effect of a dismissal pursuant to a local rule varies from jurisdiction to jurisdiction. In the absence of a statute or rule to the contrary, it is usually held that such a dismissal is not res judicata because it is not an adjudication on the merits. Comment, *supra* note 180, at 924-25; Annot., *supra* note 179, at 495.

186. We found a few cases which did not fall into any of these categories. In one case a district court dismissed for refusal to sign a stipulation of facts in a pretrial order. The court of appeals reversed because a court cannot order stipulations. J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976). Another case was dismissed for failure to inform the court of the name of local replacement counsel. This decision was also reversed on appeal because dismissal is to be reserved for extreme cases, plaintiff was not contumacious, and lesser sanctions would better serve justice. Connolly v. Papachristid Shipping Ltd., 504 F.2d 917 (5th Cir. 1974). Another case was dismissed for refusal to give the parents notice of a hearing for appointment of a guardian ad litem for their child. This decision was reversed because requiring notice to parents in a case challenging parental vetoes of contraceptives would compromise the plaintiff's privacy and because appointment of parents as guardians ad litem was inappropriate. M.S. v. Wermers, 557 F.2d 170 (8th Cir. 1977). We also found an isolated case of dismissal for attempting to build a case with falsified evidence and attempted cover-up of the falsification. The district court purported to dismiss under its inherent power. United States v. Moss-American, Inc., 78 F.R.D. 214 (E.D. Wis. 1978).

187. *See* Davis v. Williams, 588 F.2d 69 (4th Cir. 1978) (dormant for almost two years); SEC v. Power Resources Corp., 495 F.2d 297 (10th Cir. 1974) (three years' delay); Hollenback v. Calif. Western R.R., 465 F.2d 122 (9th Cir. 1972) (dormant for

three years, except for some discovery taken within the first year); Maxey v. Citizens Nat'l Bank of Lubbock, 459 F.2d 56 (5th Cir. 1972) (dormant for four years); Spering v. Texas Butadiene & Chemical Corp., 434 F.2d 677 (3d Cir. 1970), *cert. denied*, 404 U.S. 854 (1971) (case not pressed for three years except for the filing of four interrogatories); Alexander v. Pacific Maritime Ass'n, 434 F.2d 281 (9th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971) (plaintiffs waited nine months after being the subject of an unfavorable arbitration award and then acted only when the court issued, *sua sponte*, an order to show cause why the case should not be dismissed); Glo Co. v. Murchison & Co., 397 F.2d 928 (3d Cir. 1967), *cert. denied*, 393 U.S. 939 (1968) (twelve years without significant progress); Gorsuch v. Provident Sec. Life Ins. Co., 392 F.2d 200 (9th Cir. 1968) (dormant for three years after it had been remanded by the appellate court; only a few status hearings held); Kenney v. California Tanker Co., 381 F.2d 775 (3d Cir. 1967), *cert. denied*, 390 U.S. 904 (1968) (little progress except some discovery over a four-year period); Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) (dormant for twenty-one months); Bendix Aviation Corp. v. Glass, 314 F.2d 944 (3d Cir.), *cert. denied*, 375 U.S. 817 (1963) (pending for eleven years; case put on the protracted calendar, and the plaintiff did nothing to advance the cause); Darlington v. Studebaker-Packard Corp., 261 F.2d 903 (7th Cir.), *cert. denied*, 359 U.S. 992 (1959) (claim lay dormant for one year, was put on the dismissal calendar, and still the plaintiff took no action until the dismissal was entered); Glickfeld v. Carleton, 253 F.2d 426 (1st Cir. 1958) (the case went three terms of court without action and was dismissed without prejudice); Messenger v. United States, 231 F.2d 328 (2d Cir. 1956) (lack of prosecution for six years); Salmon v. City of Stuart, Fla., 194 F.2d 1004 (5th Cir. 1952) (no action for one year and three months); Hicks v. Bekins Moving & Storage Co., 115 F.2d 406 (9th Cir. 1940) (no action for a year and the case was called fourteen times); Smith v. Josten's Am. Yearbook Co., 78 F.R.D. 154 (N.D. Kan. 1978) (plaintiff did not communicate with her attorney for more than six months, her whereabouts were unknown, and she four times failed to appear for depositions); Forest Nursery Co. v. Crete Carrier Corp., 319 F. Supp. 213 (E.D. Tenn. 1969) (six months without action); Pacific Indemnity Co. v. United States, 66 F.R.D. 493 (E.D.N.C. 1975), *aff'd without opinion*, 532 F.2d 751 (4th Cir. 1976); S&K Airport Drive-in, Inc. v. Paramount Film Distributing Corp., 58 F.R.D. 4 (E.D. Pa.), *aff'd without opinion*, 491 F.2d 751 (3d Cir. 1973) (three-and-one-half years without action); King v. Mordowanec, 46 F.R.D. 474 (D.R.I. 1969) (dormant from term to term of the court).

188. *See* Shotkin v. Westinghouse Electric & Mfg. Co., 161 F.2d 825 (10th Cir. 1948).

189. *See, e.g.*, Asociacion de Empleados del Instituto de Cultura Puertorriquena v. Rodriguez Morales, 538 F.2d 915 (1st

Cir. 1976); Provenza v. H.&W. Wrecking Co., 424 F.2d 629 (5th Cir. 1970); Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323 (5th Cir. 1968), *cert. denied*, 393 U.S. 1050 (1969); Tradeways, Inc. v. Chrysler Corp., 342 F.2d 350 (2d Cir.), *cert. denied*, 382 U.S. 832 (1965) (held trial court should have dismissed the case because of the repeated continuances and the prejudice suffered by the defendant); Grunewald v. Missouri Pac. R. Co., 331 F.2d 983 (8th Cir. 1964); Sandee Mfg. Co. v. Rohm & Haas Co., 298 F.2d 41 (7th Cir. 1962); Janousek v. French, 287 F.2d 616 (8th Cir. 1961); Sweeney v. Anderson, 129 F.2d 756 (10th Cir. 1942).

190. *See* Sheaffer v. Warehouse Emp. Union Local No. 730, 408 F.2d 204 (D.C. Cir.), *cert. denied*, 395 U.S. 934 (1969).

191. *See* Link v. Wabash Ry., 370 U.S. 626 (1962); Citizens Utilities Co. v. American Telephone & Telegraph Co., 595 F.2d 1171 (9th Cir.), 444 U.S. 931, 100 S. Ct. 273 (1979); Moore v. Telfon Communications Corp., 589 F.2d 959 (9th Cir. 1978); Davis v. Williams, 588 F.2d 69 (4th Cir. 1978); Asociacion de Empleados del Instituto de Cultura Puertorriquena v. Rodriguez Morales, 538 F.2d 915 (1st Cir. 1976); Cherry v. Brown-Frazier-Whitney, 548 F.2d 965 (D.C. Cir. 1976); Ramsay v. Bailey, 531 F.2d 706 (5th Cir. 1976), *cert. denied*, 429 U.S. 1107 (1977); Krodel v. Houghtaling, 468 F.2d 887 (4th Cir. 1972), *cert. denied*, 414 U.S. 829 (1973); Theilmann v. Rutland Hospital, Inc., 455 F.2d 853 (2d Cir. 1972); Provenza v. H.&W. Wrecking Co., 424 F.2d 629 (5th Cir. 1970); Alexander v. Pacific Maritime Ass'n, 434 F.2d 281 (9th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971); Sheaffer v. Warehouse Emp. Union Local No. 730, 408 F.2d 204 (D.C. Cir.), *cert. denied*, 395 U.S. 934 (1969); Theodoropoulos v. Thompson-Starret Co., 418 F.2d 350 (2d Cir. 1969), *cert. denied*, 398 U.S. 905 (1970); Redac Project 6426, Inc. v. Allstate Ins. Co., 412 F.2d 1043 (2d Cir. 1969); Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323 (5th Cir. 1968), *cert. denied*, 393 U.S. 1050 (1969); Demeulenaere v. Rockwell Mfg. Co., 312 F.2d 209 (2d Cir. 1962), *cert. denied*, 374 U.S. 813 (1963); Smith v. Josten's Am. Yearbook Co., 78 F.R.D. 154 (D. Kan. 1978); Gardner v. Benton, 452 F. Supp. 170 (E.D. Okla. 1977); Pacific Indemnity Co. v. United States, 66 F.R.D. 493 (E.D.N.C. 1975), *aff'd without opinion*, 532 F.2d 751 (4th Cir. 1976); Koury v. International Brotherhood of Teamsters, 69 F.R.D. 474 (E.D. Pa. 1975), *aff'd without opinion*, 547 F.2d 1161 (3d Cir. 1976); King v. Mordowanec, 46 F.R.D. 474 (D.R.I. 1969).

But see SEC v. Everest Management Corp., 466 F. Supp. 167 (S.D.N.Y. 1979) (passage of six years without any substantial action insufficient for dismissal; plaintiff awaiting the outcome of criminal charges based on the same facts); Boazman v. Economics Laboratory, Inc., 537 F.2d 210 (5th Cir. 1976); International Ass'n of Heat and Frost Insulators and Asbestos Workers, Local 66, AFL-CIO v. Leona Lee Insulation & Specialties, Inc., 516 F.2d 504 (5th Cir. 1975); Reizakis v. Loy, 490 F.2d

1132 (4th Cir. 1974); Bush v. United States Postal Service, 496 F.2d 42 (4th Cir. 1974); Boag v. Johnson, 54 F.R.D. 178 (S.D. Cal.), rev'd on other grounds, 470 F.2d 412 (9th Cir. 1972).

192. SEC v. Power Resources Corp., 495 F.2d 297 (10th Cir. 1974) (no precise rule as to what circumstances justify a dismissal for failure to prosecute. Instead, the history of each case must be examined to make such a determination.); Marshall v. Sielaff, 492 F.2d 917 (3d Cir. 1974) (no precise rule can be laid down; rather the procedural history of the case must be examined); Richman v. General Motors Corp., 437 F.2d 196 (1st Cir. 1971) (each case must be judged individually); Sandee Mfg. Co. v. Rohm & Haas Co., 298 F.2d 41 (7th Cir. 1962) (no exact rule can be laid down).

193. Shaw v. Estelle, 542 F.2d 954 (5th Cir. 1976) (per curiam) (in which the plaintiff, a prisoner, filed a civil rights suit. While the suit was pending in district court, the plaintiff escaped. Three months and two hearing dates later, the district court dismissed the case for failure to prosecute.).

194. Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323 (5th Cir. 1968), cert. denied, 393 U.S. 1050 (1969) (in which seven years after the filing of an antitrust action, all parties were ordered to file a pretrial "note of evidence" detailing the witnesses and their testimony. The notes were not filed by the deadline. Seven years later the defendants moved to dismiss. After several continuances requested by the plaintiff, the case was dismissed.).

195. See discussion of local rules in text accompanying footnotes 2-26 supra.

196. See, e.g., Spering v. Texas Butadiene & Chemical Corp., 434 F.2d 677 (3d Cir. 1970), cert. denied, 404 U.S. 854 (1971) (in which, pursuant to a local rule, the defendant moved to dismiss because nothing was done to press the case for three years, except the filing of four interrogatories); Sheaffer v. Warehouse Emp. Union Local No. 730, 408 F.2d 204 (D.C. Cir.), cert. denied, 395 U.S. 934 (1969) (numerous violations of local rules and pretrial orders); Kenney v. California Tanker Co., 381 F.2d 775 (3d Cir. 1967), cert. denied, 390 U.S. 904 (1968) (dismissal pursuant to local rule 12 and rule 41(b)); Zaroff v. Holmes, 379 F.2d 875 (D.C. Cir. 1967) (dismissal pursuant to local rule 12 for failure to appear for a pretrial hearing amounting to lack of prosecution); Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) (in which, after the case lay dormant for many months, it was put on the dismissal calendar pursuant to local rule 14); Link v. Wabash Ry. Co., 291 F.2d 542 (7th Cir. 1961), aff'd, 370 U.S. 626 (1962) (in which, pursuant to local rule 11, a case which lay dormant for more than a year went on to the dismissal calendar); United States v. Richlyn Laboratories, Inc.,

365 F. Supp. 805 (E.D. Pa. 1973) (dismissal pursuant to local rule for failure to respond to a status call and proceed with the case).

In Link v. Wabash Ry., 370 U.S. 626, 627-28 n.7, the Court recognized, and implicitly approved, the practice of many district courts to use local rules to establish special call calendars for the purpose of dismissing state cases where neither adequate excuses for past delays nor reasons for further continuances appear.

The Court in *Link* also made it clear that the absence of a local rule covering failure to prosecute is no bar to a dismissal. 370 U.S. 626, 627 n.8.

197. *See, e.g.*, Ramsay v. Bailey, 531 F.2d 706 (5th Cir. 1976), *cert. denied*, 429 U.S. 1107 (1977); States S.S. Co. v. Philippine Air Lines, 426 F.2d 803 (9th Cir. 1970); Demeulenaere v. Rockwell Mfg. Co., 312 F.2d 209 (2d Cir. 1962), *cert. denied*, 374 U.S. 813 (1963); U.S.N. Co. v. American Express Co., 55 F.R.D. 31 (E.D. Pa. 1972).

198. *See, e.g.*, Ramsay v. Bailey, 531 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1107 (1977); Rohauer v. Eastin-Phelan Corp., 499 F.2d 120 (8th Cir. 1974); California Molasses Co. v. C. Brewer & Co., 479 F.2d 60 (9th Cir. 1973); Welsh v. Automatic Poultry Feeder Co., 439 F.2d 95 (8th Cir. 1971); States S.S. Co. v. Philippine Air Lines, 426 F.2d 803 (9th Cir. 1970); Smith v. Josten's Am. Yearbook Co., 78 F.R.D. 154 (D. Kan. 1978); Gardner v. Benton, 452 F. Supp. 170 (E.D. Okla. 1977).

199. *See, e.g.*, Bautista v. Concentrated Employment Program of Dep't of Labor, 459 F.2d 1019 (9th Cir. 1972); Koury v. International Brotherhood of Teamsters, 69 F.R.D. 474 (E.D. Pa.), *aff'd without opinion*, 547 F.2d 1161 (E.D. Pa. 1975); Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323 (5th Cir. 1968), *cert. denied*, 393 U.S. 1050 (1969).

200. *See* Maxey v. Citizens Nat'l Bank of Lubbock, 459 F.2d 56 (5th Cir. 1972).

201. Pacific Indemnity Co. v. United States, 66 F.R.D. 493 (E.D.N.C. 1975), *aff'd without opinion*, 532 F.2d 751 (4th Cir. 1976); Navarro v. Chief of Police, Des Moines, Iowa, 523 F.2d 214 (8th Cir. 1975) (no resistance offered to a motion to dismiss and no response to a letter from the court received).

202. Krodel v. Houghtaling, 468 F.2d 887 (4th Cir. 1972) (the fact that the plaintiff had ample time to develop his case but had not interviewed or subpoenaed witnesses was an indication of lack of prosecutorial intent), *cert. denied*, 414 U.S. 829 (1973).

203. *See, e.g.*, Link v. Wabash Ry. Co., 370 U.S. 626

(1962); Beshear v. Weinzapfel, 474 F.2d 127 (7th Cir. 1973); Provenza v. H.&W. Wrecking Co., 424 F.2d 629 (5th Cir. 1970).

204. Sandee Mfg. Co. v. Rohm & Haas Co., 298 F.2d 41 (7th Cir. 1962) (the case was set for trial four times and nine pretrial conferences were conducted).

205. Fed. R. Civ. P. 41(b). The presumption that a rule 41 dismissal is with prejudice unless otherwise stated is contrary to the common law rule which presumes that a dismissal on procedural grounds is without prejudice.

206. Glickfeld v. Carleton, 253 F.2d 426 (1st Cir. 1958); Stevens v. Red Barn Chemicals, Inc., 76 F.R.D. 111 (W.D. Okla. 1977); United States v. Richlyn Laboratories, Inc., 365 F. Supp. 805 (E.D. Pa. 1973); Ordnance Gauge Co. v. Jacquard Knitting Machine Co., 21 F.R.D. 575 (E.D. Pa. 1958), aff'd, 265 F.2d 189 (3d Cir.), cert. denied, 361 U.S. 829 (1959) (dismissed without prejudice under the local rule stating that although rule 41(b) is applicable, the dismissal should be under that rule which proscribes a dismissal with prejudice).

207. Zavala Santiago v. Gonzales Rivera, 553 F.2d 710 (1st Cir. 1977).

208. Link v. Wabash Ry. Co., 370 U.S. 626, 633 (1962).

209. Citizens Utilities Co. v. American Telephone & Telegraph Co., 595 F.2d 1171 (9th Cir.) (but existence of actual prejudice is important in deciding if a delay is unreasonable), cert. denied, 444 U.S. 931 (1979); Moore v. Telfon Communications Corp., 589 F.2d 959 (9th Cir. 1978); Alexander v. Pacific Maritime Ass'n, 434 F.2d 281 (9th Cir. 1970), cert. denied, 401 U.S. 1009 (1971).

210. Bautista v. Concentrated Employment Program of Dep't of Labor, 459 F.2d 1019 (9th Cir. 1972); States S.S. Co. v. Philippine Air Lines, 426 F.2d 803 (9th Cir. 1970); Alexander v. Pacific Maritime Ass'n, 434 F.2d 281 (9th Cir. 1970), cert. denied, 401 U.S. 1009 (1971).

211. States S.S. Co. v. Philippine Air Lines, 426 F.2d 803 (9th Cir. 1970).

212. See Citizens Utilities Co. v. American Telephone & Telegraph Co., 595 F.2d 1171 (9th Cir.), cert. denied, 444 U.S. 931 (1979); Moore v. Telfon Communications Corp., 589 F.2d 959 (9th Cir. 1978); California Molasses Co. v. C. Brewer & Co., 479 F.2d 60 (9th Cir. 1973); Bautista v. Concentrated Employment Program of Dep't of Labor, 459 F.2d 1019 (9th Cir. 1972); Hollenback v. California Western R.R., 465 F.2d 122 (9th Cir. 1972); Schmidt v. Wallenius Line, 455 F.2d 1088 (9th Cir. 1972);

States S.S. Co. v. Philippine Air Lines, 426 F.2d 803 (9th Cir. 1970); Alexander v. Pacific Maritime Ass'n, 434 F.2d 281 (9th Cir. 1970); *cert. denied*, 401 U.S. 1009 (1971); Gorsuch v. Provident Sec. Life Ins. Co., 392 F.2d 200 (9th Cir. 1968); Russell v. Cunningham, 233 F.2d 806 (9th Cir. 1956); Boling v. United States, 231 F.2d 926 (9th Cir. 1956); Hicks v. Bekins Moving & Storage Co., 115 F.2d 406 (9th Cir. 1940). *But cf.* Jarva v. United States, 280 F.2d 892 (9th Cir. 1960) (inability of a plaintiff to attend trial due to illness is a sufficient excuse for failure to prosecute, unless the defendant can be shown to have suffered unusual prejudice; the dismissal by the trial court was reversed).

213. Davis v. Williams, 588 F.2d 69 (4th Cir. 1978).

214. *See, e.g.*, Boazman v. Economics Laboratory, Inc., 537 F.2d 210 (5th Cir. 1976); Connolly v. Papachristid Shipping Ltd., 504 F.2d 917 (5th Cir. 1974); Mann v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 488 F.2d 75 (5th Cir. 1973); Canada v. Mathews, 449 F.2d 253 (5th Cir. 1971). The Fifth Circuit holds that dismissal is a harsh sanction to be used only in extreme cases.

The First Circuit also holds that a dismissal should only be used when lesser sanctions would not serve the ends of justice. Asociacion de Empleados del Instituto de Cultura Puertorriquera v. Rodriguez Morales, 538 F.2d 915 (1st Cir. 1976).

See generally McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976); Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974); Bush v. United States Postal Service, 496 F.2d 42 (4th Cir. 1974); Navarro v. Chief of Police, Des Moines, Iowa, 523 F.2d 214 (8th Cir. 1975); Meeker v. Rizley, 324 F.2d 269 (10th Cir. 1963).

215. Ramsay v. Bailey, 531 F.2d 706 (5th Cir. 1976), *cert. denied*, 429 U.S. 1107 (1977).

216. Messenger v. United States, 231 F.2d 328 (2d Cir. 1956); Saylor v. Lindsley, 71 F.R.D. 380 (S.D.N.Y. 1976). *But see* SEC v. Everest Management Corp., 466 F. Supp. 167 (S.D.N.Y. 1979) (motion to dismiss denied; one factor considered by the court was lack of prejudice to the defendants); Raab v. Taber Instrument Corp., 546 F.2d 522 (2d Cir. 1976) (seven years without significant action considered insufficient to justify dismissal since, at the end of that period, both parties and court instilled "new life" into the case by agreeing to timetable for proceeding), *cert. denied*, 431 U.S. 915 (1977).

217. United States v. Inter-American Shipping Corp., 455 F.2d 938 (5th Cir. 1972); Dyotherm Corp. v. Turbo Mach. Co., 392 F.2d 146 (3d Cir. 1968), *on remand*, 48 F.R.D. 380 (E.D. Pa. 1969), *appeal dismissed*, 434 F.2d 65 (3d Cir. 1970); Colonial Drive-in Theatre, Inc. v. Warner Bros. Pictures, Inc., 262 F.2d 856 (2d Cir. 1959) (per curiam) (reversed dismissal on the

grounds, *inter alia*, that defendants had been at least equally responsible for the delay in the progress of the suit); Foxboro Co. v. Fischer & Porter, 29 F.R.D. 522 (E.D. Pa. 1961); Tinnerman Products, Inc. v. George K. Garrett Co., 22 F.R.D. 56 (E.D. Pa. 1958).

218. Glo Co. v. Murchinson & Co., 397 F.2d 928 (3d Cir. 1967), *cert. denied*, 393 U.S. 939 (1968); Demeulenaere v. Rockwell Mfg. Co., 312 F.2d 209 (2d Cir. 1962), *cert. denied*, 374 U.S. 813 (1963).

219. *See, e.g.*, Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972); Vindigni v. Meyer, 441 F.2d 376 (2d Cir. 1971); Flaska v. Little River Marine Constr. Co., 389 F.2d 885 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968); King v. Mordowanec, 46 F.R.D. 474 (D.R.I. 1969); Schneider v. American Export Lines, 293 F. Supp. 117 (S.D.N.Y. 1968).

One commentator has identified certain additional factors which he believes are followed in the decision making, including: the extent to which the court was inconvenienced by the plaintiff's conduct; whether the plaintiff made any efforts to comply with court orders; and, in cases with multiple plaintiffs, a court may be influenced favorably if some of the plaintiffs have been diligent in prosecuting the case. Annot., *supra* note 180, at 421, 430, 434, 437.

220. *See, e.g.*, Scarver v. Allen, 457 F.2d 308 (7th Cir. 1972); Dyotherm Corp. v. Turbo Machine Co., 392 F.2d 146 (3d Cir. 1968), *on remand*, 48 F.R.D. 380 (E.D. Pa. 1969), *appeal dismissed*, 434 F.2d 65 (3d Cir. 1970) (in which plaintiff corporation's president was ill and could not appear; on remand the case was dismissed with prejudice since plaintiff did not comply with court order); Davis v. Operation Amigo, 378 F.2d 101 (10th Cir. 1967); Jarva v. United States, 280 F.2d 892 (9th Cir. 1960); Rankin v. Shayne Bros., Inc., 280 F.2d 55 (D.C. Cir. 1960).

221. Bibeau v. Northeast Airlines, 429 F.2d 212 (D.C. Cir. 1970); Red Warrior Coal & Mining Co. v. Boron, 194 F.2d 578 (3d Cir. 1952).

222. Stanley v. Alcock, 310 F.2d 17 (5th Cir. 1962).

223. McCombs v. Pittsburgh-Des Moines Steel Corp., 426 F.2d 264 (10th Cir. 1970).

224. Coon v. Charles W. Bliven & Co., Inc., 534 F.2d 44 (5th Cir.), *cert. denied*, 429 U.S. 980 (1976).

225. Red Warrior Coal & Mining Co. v. Boron, 194 F.2d 578 (3d Cir. 1952).

226. Link v. Wabash Ry. Co., 370 U.S. 626 (1962); Garden

Homes, Inc. v. Mason, 249 F.2d 71 (1st Cir. 1957), cert. denied, 356 U.S. 903 (1958). See also Montgomery v. Commissioner, 367 F.2d 917 (9th Cir. 1966) (in which the taxpayer-petitioner argued that he had suffered severe financial loss and all his time in the ensuing years was spent attending to his business and recouping losses).

227. Hicks v. Bekins Moving & Storage, 115 F.2d 406 (9th Cir. 1940); Bendix Aviation Corp. v. Glass, 32 F.R.D. 375 (E.D. Pa. 1961), aff'd, 314 F.2d 944 (3d Cir.), cert. denied, 375 U.S. 817 (1963); Dabney v. Burrell, 67 F.R.D. 132 (D. Md. 1975).

228. States S.S. Co. v. Philippine Air Lines, 426 F.2d 803 (9th Cir. 1970).

229. Jameson v. Du Comb, 275 F.2d 293 (7th Cir. 1960); Mooney v. Central Motor Lines, 222 F.2d 572 (6th Cir. 1955).

230. Janousek v. Wells, 303 F.2d 118 (8th Cir. 1962); Peardon v. Chapman, 169 F.2d 909 (3d Cir. 1948).

231. Shaw v. Estelle, 542 F.2d 954 (5th Cir. 1976).

232. Tradeways Inc. v. Chrysler Corp., 342 F.2d 350 (2d Cir.), cert. denied, 382 U.S. 832 (1965).

233. See Lopez v. Aransas Cty. Independent Sch. Dist., 570 F.2d 541 (5th Cir. 1978); Sullivan v. Pacific Indem. Co., 566 F.2d 444 (3d Cir. 1977); Marshall v. Sielaff, 492 F.2d 917 (3d Cir. 1974); Theilmann v. Rutland Hospital, Inc., 455 F.2d 853 (2d Cir. 1972); Melton v. Maritime Overseas Corp., 432 F.2d 108 (4th Cir. 1970); Michelsen v. Moore-McCormack Lines, Inc., 429 F.2d 394 (2d Cir. 1970); Thompson v. Fleming, 402 F.2d 266 (5th Cir. 1968); Hooper v. Chrysler Motors Corp., 325 F.2d 321 (5th Cir. 1963), cert. denied, 377 U.S. 967 (1964); Shaffer v. Evans, 263 F.2d 134 (10th Cir. 1958) (per curiam), cert. denied, 359 U.S. 990 (1959); Vaughan v. City Bank & Trust Co., 218 F.2d 802 (5th Cir.), cert. denied, 350 U.S. 832 (1955).

234. Marshall v. Sielaff, 492 F.2d 917 (3d Cir. 1974).

235. McCombs v. Pittsburgh-Des Moines Steel Co., 426 F.2d 264 (10th Cir. 1970).

236. Brown v. Thompson, 430 F.2d 1214 (5th Cir. 1970).

237. Durham v. Florida East Coast Ry. Co., 385 F.2d 366 (5th Cir. 1967).

238. Torino v. Texaco, Inc., 378 F.2d 268 (3d Cir. 1967); Durgin v. Graham, 372 F.2d 130 (5th Cir.), cert. denied, 388 U.S. 919 (1967); Grunewald v. Missouri R.R. Co., 331 F.2d 983 (8th

Cir. 1964) (plaintiff appeared for trial without counsel, despite several continuances for the purpose of securing local counsel); Esteva v. House of Seagram, Inc., 314 F.2d 827 (7th Cir.), cert. denied, 375 U.S. 826 (1963) (in which plaintiff failed to make timely appearance on the second day of trial); Janousek v. French, 287 F.2d 616 (8th Cir. 1961); Cunningham v. United States, 295 F.2d 535 (9th Cir. 1961); Edmond v. Moore-McCormack Lines, Inc., 253 F.2d 143 (2d Cir.) (per curiam), cert. denied, 358 U.S. 848 (1958); Agronofsky v. Pennsylvania Greyhound Lines, 248 F.2d 829 (3d Cir. 1957) (per curiam); Sweeney v. Anderson, 129 F.2d 756 (10th Cir. 1942) (without prejudice); Peterson v. Terminal Taxi, Inc., 45 F.R.D. 349 (S.D.N.Y. 1968), rev'd, 429 F.2d 888 (2d Cir. 1970).

239. Coon v. Charles W. Bliven & Co., Inc., 534 F.2d 44 (5th Cir.), cert. denied, 429 U.S. 980 (1976); International Ass'n of Heat and Frost Insulators and Asbestos Workers, Local 66, AFL-CIO v. Leona Lee Insulation & Specialties, Inc., 516 F.2d 504 (5th Cir. 1975).

240. Vindigni v. Meyer, 441 F.2d 376 (2d Cir. 1971).

241. Stanley v. Alcock, 310 F.2d 17 (5th Cir. 1962).

242. International Ass'n of Heat and Frost Insulators and Asbestos Workers, Local 66, AFL-CIO v. Leona Lee Insulation & Specialties, Inc., 516 F.2d 504 (5th Cir. 1975); Brown v. O'Leary, 512 F.2d 485 (5th Cir. 1975).

243. Coon v. Charles W. Bliven & Co., Inc., 534 F.2d 44 (5th Cir.), cert. denied, 429 U.S. 980 (1976).

244. Moore v. St. Louis Music Supply Co., 539 F.2d 1191 (8th Cir. 1976).

245. Davis v. Operation Amigo, Inc., 378 F.2d 101 (10th Cir. 1967) (the plaintiff should be given an opportunity to substantiate her excuse).

246. Michelson v. Moore-McCormack Lines, Inc., 429 F.2d 394 (2d Cir. 1970); Thomas v. Fleming, 402 F.2d 266 (5th Cir. 1968); Schwarz v. United States, 384 F.2d 833 (2d Cir. 1967); Deep South Oil Co. v. Metropolitan Life Ins. Co., 310 F.2d 933 (2d Cir. 1962); Joseph v. Norton Co., 273 F.2d 65 (2d Cir. 1959); United States v. 45.33 Acres of Land, 266 F.2d 741 (4th Cir. 1959) (in which government exhibited a lack of preparation during proceedings for condemnation of a basehold estate); Du Boyce v. Kruger & Birch, 241 F.2d 855 (3d Cir. 1957) (per curiam); Quagliano v. United States, 293 F. Supp. 670 (S.D.N.Y. 1968); Giovantetti v. Georgetown University Hospital, 22 F.R.D. 493 (D.D.C. 1958), cert. denied, 361 U.S. 831 (1959).

247. Bardin v. Mondon, 298 F.2d 235 (2d Cir. 1961) (in which counsel explained that he thought an associate would be discharged from the hospital in time to try the case; the court did not approve of counsel's conduct but did not think the sins of the lawyer should be visited on the client); Red Warrior Coal & Mining Co. v. Boron, 194 F.2d 578 (3d Cir. 1952).

248. Link v. Wabash Ry. Co., 370 U.S. 626 (1962); Murrah v. Fire Insurance Exchange, 480 F.2d 613 (5th Cir. 1973).

249. Van Bronkhorst v. Safeco Corp., 529 F.2d 943 (9th Cir. 1976); Beshear v. Weinzapfel, 474 F.2d 127 (7th Cir. 1973); Mooney v. Central Motor Lines, Inc., 222 F.2d 572 (6th Cir. 1955).

250. Kung v. FOM Investment Corp., 563 F.2d 1316 (9th Cir. 1977).

251. Silas v. Sears, Roebuck & Co., 586 F.2d 382 (5th Cir. 1978); Council of Federated Organizations v. Mize, 339 F.2d 898 (5th Cir. 1974).
But see Dominquez v. United States, 583 F.2d 615 (2d Cir. 1978) (plaintiff bound by the gross negligence of her attorney because there were no extenuating circumstances and no efforts by plaintiff to induce him to act), cert. denied, 439 U.S. 1117 (1979).

252. Vindigni v. Meyer, 441 F.2d 376 (2d Cir. 1971).

253. Moreno v. Collins, 362 F.2d 176 (7th Cir. 1966).

254. Dove v. Codesco, 569 F.2d 807 (4th Cir. 1978).

255. Silas v. Sears, Roebuck & Co., 586 F.2d 382 (5th Cir. 1978); Bush v. United States Postal Service, 496 F.2d 42 (4th Cir. 1974).

256. Fischer v. Buehl, 450 F.2d 950 (3d Cir. 1971).

257. Zaroff v. Holmes, 379 F.2d 875 (D.C. Cir. 1967) (an improper construction of a local rule was also an important factor in reversing the dismissal).

258. Meeker v. Rizley, 324 F.2d 269 (10th Cir. 1963).

259. Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976); Joseph Muller Corp., Zurich v. Societe Anonyme de Gerance et d'Armement, 508 F.2d 814 (2d Cir. 1974); Dewey v. Farchone, 460 F.2d 1338 (7th Cir. 1972); Pearson v. Dennison, 353 F.2d 24 (9th Cir. 1965); Waterman v. Nelson, 195 F.2d 523 (2d Cir.), cert. denied, 344 U.S. 843 (1952); Felder v. Daley, 403 F. Supp. 1324 (S.D.N.Y. 1975); Shale v. Florida Times-Union, 291 F. Supp. 407 (M.D. Fla. 1968).

260. Dewey v. Farchone, 460 F.2d 1338 (7th Cir. 1972) (eleven months); Truncale v. Universal Pictures Co., 82 F. Supp. 576 (S.D.N.Y. 1949).

261. Saylor v. Lindsley, 71 F.R.D. 380 (S.D.N.Y. 1976).

262. *See* Joseph Muller Corp., Zurich v. Societe Anonyme de Gerance et d'Armement, 508 F.2d 814 (2d Cir. 1974); Taub v. Hale, 355 F.2d 201 (2d Cir.), *cert. denied*, 384 U.S. 1007 (1966); Lyford v. Carter, 274 F.2d 815 (2d Cir. 1960); Messenger v. United States, 231 F.2d 328 (2d Cir. 1956); Waterman v. Nelson, 195 F.2d 523 (2d Cir.) (per curiam), *cert. denied*, 344 U.S. 843 (1952); Charles Labs, Inc. v. Banner, 79 F.R.D. 55 (S.D.N.Y. 1978); Saylor v. Lindsley, 71 F.R.D. 380 (S.D.N.Y. 1976); Felder v. Daley, 403 F. Supp. 1324 (S.D.N.Y. 1975); Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976). *See also* Vina v. Hub Electric Co., 480 F.2d 1139 (7th Cir. 1973); Durst v. Nat'l. Casualty Co., 452 F.2d 610 (9th Cir. 1971), *cert. denied*, 409 U.S. 967 (1972); Pearson v. Dennison, 353 F.2d 24 (9th Cir. 1965); Rollins v. United States, 286 F.2d 761 (9th Cir. 1961); Huffmaster v. United States, 186 F. Supp. 120 (N.D. Cal. 1960); Cristanelli v. United States Lines, 74 F.R.D. 590 (C.D. Cal. 1977).

263. Joseph Muller Corp., Zurich v. Societe Anonyme de Gerance et d'Armement, 508 F.2d 814 (2d Cir. 1974); Charles Labs, Inc. v. Banner, 79 F.R.D. 55 (S.D.N.Y. 1978); Felder v. Daley, 403 F. Supp. 1324 (S.D.N.Y. 1975); Saylor v. Lindsley, 71 F.R.D. 380 (S.D.N.Y. 1976).

264. Saylor v. Lindsley, 71 F.R.D. 380 (S.D.N.Y. 1976).

265. Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976); Pearson v. Dennison, 353 F.2d 24 (9th Cir. 1965).

266. Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976).

267. See note 177 *supra*.

268. In spite of the Supreme Court's statement in Societe Internationale v. Rogers, 357 U.S. 197 (1958), that rule 37 is the exclusive source of authority for dismissals based on discovery abuse, dismissals under rule 41(b) have been used to sanction disobedience of court orders to provide discovery. Hepperle v. Johnston, 590 F.2d 609 (5th Cir. 1979) (in which dismissal was affirmed pursuant to rule 41(b) because of repeated failure to comply with court orders to appear for deposition).

269. Fed. R. Civ. P. 8(a) provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim,

shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

See Fendler v. Westgate-California Corporation, 527 F.2d 1168 (9th Cir. 1975); Finley v. Rittenhouse, 416 F.2d 1186 (9th Cir. 1969); Schaedler v. Reading Eagle Publication, Inc., 370 F.2d 795 (3d Cir. 1967); Agnew v. Moody, 330 F.2d 868 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964); O'Brien v. Sinatra, 315 F.2d 637 (9th Cir. 1963); Package Machinery Co. v. Hayssen Mfg. Co., 266 F.2d 56 (7th Cir. 1959).

270. *See* Ferro v. Railway Exp. Agency, Inc., 27 F.R.D. 487 (S.D.N.Y.), *aff'd in part, rev'd in part on other grounds*, 296 F.2d 847 (2d Cir. 1961).

271. *See, e.g.*, Schaedler v. Reading Eagle Publication, Inc., 370 F.2d 795 (3d Cir. 1967).

272. *See, e.g.*, Fendler v. Westgate-California Corp., 527 F.2d 1168 (9th Cir. 1975); Hyler v. Reynolds Metal Co., 434 F.2d 1064 (5th Cir. 1970), *cert. denied*, 403 U.S. 912 (1971); Finley v. Rittenhouse, 416 F.2d 1186 (9th Cir. 1969); Agnew v. Moody, 330 F.2d 868 (9th Cir.) (failure to amend within twenty days as ordered), *cert. denied*, 379 U.S. 867 (1964); O'Brien v. Sinatra, 315 F.2d 637 (9th Cir. 1963); Package Machinery Co. v. Hayssen Mfg. Co., 266 F.2d 56 (7th Cir. 1959); Barger v. Baltimore & O.R. Co., 130 F.2d 401 (D.C. Cir. 1942) (in which the plaintiff continued to bring the same claim).

273. Marshall v. Southern Farm Bureau Casualty Co., 353 F.2d 737 (5th Cir. 1965), *cert. denied*, 384 U.S. 910 (1966). The documents were to be produced to and inspected by the court only. The dismissal was not for disobedience of a discovery order and dismissal under rule 41(b) was proper.

274. Theodoropoulos v. Thompson-Starrett Co., 418 F.2d 350 (2d Cir. 1969), *cert. denied*, 398 U.S. 905 (1970).

275. Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970) (in which trial court dismissed the complaint because a 159-page document submitted by the party did not conform exactly to the court's order to outline the legal theories of the case; the appellate court reversed because lesser sanctions were not considered).

276. *See* Stanley v. Continental Oil Co., 536 F.2d 914 (10th Cir. 1976) (in which after waiting fourteen months from an order

requiring affidavits showing the existence of a genuine issue of material fact, the court dismissed the action); In re C.S. Crawford & Co., 423 F.2d 1322 (9th Cir. 1970) (failure to comply with a local rule requiring petitioner to furnish a referee in bankruptcy with a transcript or a summary of evidence adduced at a hearing).

277. McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976) (failure to file a proposed pretrial order; the appellate court reversed the dismissal for the following reasons: 1) plaintiff was not personally responsible for counsel's delay; 2) there was no indication that counsel was deliberately engaging in dilatory tactics; 3) no evidence was presented to show defendants were prejudiced by delay; and 4) because it was unclear whether less drastic sanctions were first considered); Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972) (in which trial court dismissed without prejudice because plaintiff's counsel failed to file a proposed pretrial order; appellate court reversed for the following reasons: 1) the statute of limitations would prevent a refiling of the case; 2) plaintiff was not a participant in the fault; 3) the conduct of counsel was no more than inadvertence; and 4) a lesser sanction would have been more appropriate); Von Poppenheim v. Portland Boxing and Wrestling Commission, 442 F.2d 1047 (9th Cir. 1971), cert. denied, 404 U.S. 1039 (1972) (in which trial court dismissed because of plaintiff's failure to file a pretrial statement to clarify the issues; appellate court, finding that it was not clear whether the failure was a result of a conscious and deliberate decision or due merely to gross advertence, affirmed since either one was inexcusable).

278. Boazman v. Economics Laboratory, Inc., 537 F.2d 210 (5th Cir. 1976) (in which trial court dismissed without prejudice because plaintiff failed to file a brief in response to defendant's motion to dismiss; appellate court held the dismissal was error because: 1) there was no contumacious indifference; 2) lesser sanctions were available to the court; and 3) the statute of limitations would prevent a refiling of the case).

279. McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976) (see note 277 supra); Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972) (see note 277 supra). See generally Boazman v. Economics Laboratory, Inc., 537 F.2d 210 (5th cir. 1976) (see note 278 supra).

280. See McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976) (see note 277 supra); Boazman v. Economics Laboratory, Inc., 537 F.2d 210 (5th Cir. 1976) (see note 278 supra); Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972) (see note 277 supra).

281. Hardin v. Briscoe, 504 F.2d 885 (5th Cir. 1974). The court ordered the plaintiff to file a sworn statement listing all cases filed by him having the same basis for relief. The appel-

late court reversed because the plaintiff was presenting a substantial question and the pendency of other cases had no relation to the determination of this claim.

282. Sepia Enterprises, Inc. v. City of Toledo, 462 F.2d 1315 (6th Cir. 1972) (in which trial court dismissed for failure to comply with its previous orders; appellate court reversed because the order created some possibility of misunderstanding).

283. *See* Von Poppenheim v. Portland Boxing and Wrestling Commission, 442 F.2d 1047 (9th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972) (see note 280 *supra*); *In re* C.S. Crawford & Co., 423 F.2d 1322 (9th Cir. 1970); Theodoropoulos v. Thompson-Starrett Co., 418 F.2d 350 (2d Cir. 1969), *cert. denied*, 398 U.S. 905 (1970).

284. Stanley v. Continental Oil Co., 536 F.2d 914 (10th Cir. 1976).

285. 370 U.S. 626 (1962).

286. *Id*. at 633-34.

287. Comment, 65 W. Va. L. Rev. 187, 189 (1963).

288. *See* Dove v. Codesco, 569 F.2d 807 (4th Cir. 1978); McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976); Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974); Hassenflu v. Pyke, 491 F.2d 1094 (5th Cir. 1974); Pond v. Braniff Airways, Inc., 453 F.2d 347 (5th Cir. 1972) (plaintiff was innocent and the attorney was no more than inadvertent); Flaska v. Little River Marine Const. Co., 389 F.2d 885 (5th Cir.) (in which counsel's conduct was indefensible but the plaintiff was innocent and other less drastic sanctions were available), *cert. denied*, 392 U.S. 928 (1968); Durham v. Graham, 372 F.2d 130 (5th Cir.), *cert. denied*, 388 U.S. 919 (1967) (in which the court cited the dissent in *Link* for the proposition that the sins of the attorney should not be visited on the client). *See also* Vidigni v. Meyer, 441 F.2d 376 (2d Cir. 1971) (the attorney was no longer attending to his practice); Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F.2d 1336 (9th Cir. 1970); Zaroff v. Holmes, 379 F.2d 875, 878 (D.C. Cir. 1967) (Burger, J., concurring):

> Irrespective of the status of the pretrial examiner's dismissal, I would remand to permit Appellant to move under Fed. R. Civ. P. 60(b)(6) to set aside the judgment in the interests of justice. Appellant's counsel allegedly missed the pretrial conference because during the fall in which the conference was scheduled he was "preoccupied" with preparing a petition for certiorari to the Supreme Court for review of his own criminal conviction. While as a rule a client must bear the consequences of the acts or omissions of his attorney, whom he chose, I do not believe that a client should be

held to anticipate that his counsel may be in durance vile or seeking to fend off that condition.

289. See Dyotherm Corp. v. Turbo Mach. Co., 392 F.2d 146 (3d Cir. 1968) (in which the court held that a dismissal for failure to prosecute was too harsh, and although counsel's actions were not to be condoned, the contempt sanction and fine on the attorney for being late, and a later order for the plaintiff to pay the defendant's expenses and costs, were sufficient), on remand, 48 F.R.D. 380 (E.D. Pa. 1969), appeal dismissed, 434 F.2d 65 (3d Cir. 1970).

290. But see Meeker v. Rizley, 324 F.2d 269 (10th Cir. 1963), which applies rule 55 to a plaintiff. The application seems unwarranted by the language of the rule.

291. 6 Moore's Federal Practice ¶ 55.02[3] at 55-14 (2d ed. 1948).

Fed. R. Civ. P. 55 provides as follows:
Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

292. Fed. R. Civ. P. 55(b)(1). The clerk may not enter such a judgment against an infant or incompetent person.

293. Fed. R. Civ. P. 55(b)(2).

294. Id.

295. Fed. R. Civ. P. 55(e). Knouff v. United States, 74 F.R.D. 555 (W.D. Pa. 1977); United States v. Zulli, 418 F. Supp. 252 (E.D. Pa. 1975); Greenbaum v. United States, 360 F. Supp. 784 (E.D. Pa. 1973); Burton v. Peartree, 326 F. Supp. 755 (E.D. Pa. 1971). But see Santiago v. HEW, 82 F.R.D. 164 (D.P.R. 1979), in which the court ordered judgment for the plaintiff because HEW failed to comply with the court's order to file memoranda. HEW challenged the judgment as violative of 55(e) but the court said it did not characterize the judgment as a default judgment but as a sanction for HEW's rebellious attitude.

Similarly, a state prisoner is not entitled to release on the default of his custodians in a habeas corpus proceeding. Allen v. Perini, 424 F.2d 134 (6th Cir.), cert. denied, 400 U.S. 906 (1970), later appealed, 458 F.2d 233 (6th Cir. 1972). In Massa v. Jiffy Products Co., 240 F.2d 702 (9th Cir.), cert. denied, 353 U.S. 947 (1957), it was unsuccessfully contended that a patent could not be invalidated by default.

The rule 55(e) prohibition apparently applies to defaults imposed as discovery sanctions under rule 37 as well as to those entered for other reasons. Note, supra note 20, at 581. The proposed amendments to the federal rules include an addition to rule 37 which would allow notification of the attorney general or other executive heads of agencies that the United States through its officers or attorneys has failed to participate in good faith in discovery. Revised Preliminary Draft, supra note 2.

296. Fed. R. Civ. P. 55(b)(2).

297. However, a letter response to a complaint has been held insufficient to constitute an appearance. Wilson v. Moore and Associates, Inc., 564 F.2d 366 (9th Cir. 1977).

298. Hoffman v. New Jersey Federation of Young Men's and Young Women's Hebrew Associations, 106 F.2d 204 (3d Cir. 1939) (motion to dismiss). *Cf*. Collex, Inc. v. Walsh, 74 F.R.D. 443 (E.D. Pa. 1977) (attendance at preliminary conferences). *But see* Sayers v. Colon, 73 F.R.D. 77 (D.V.I. 1976) (motion to require plaintiff to post security).

299. United States v. Manos, 56 F.R.D. 655 (S.D. Ohio 1972). *But see* Rutland Transit Co. v. Chicago Tunnel Terminal Co., 233 F.2d 655 (7th Cir. 1956).

300. H.F. Livermore Corp. v. Aktiengesellschaft Gebuder Loepfe, 432 F.2d 689 (D.C. Cir. 1970). *But see* Port-Wide Container Co. v. Interstate Maintenance Corp., 440 F.2d 1195 (3d Cir. 1971).

301. United States v. Melichar, 56 F.R.D. 49 (E.D. Wis. 1972).

302. Turner v. Salvatierra, 580 F.2d 199 (5th Cir. 1978).

303. *Compare* Charlton L. Davis and Co. P.C. v. Fedder Data Center, 556 F.2d 308 (5th Cir. 1977) and Collex, Inc. v. Walsh, 74 F.R.D. 443 (E.D. Pa. 1977) *with* Port-Wide Container Co. v. Interstate Maintenance Corp., 440 F.2d 1195 (3d Cir. 1971). A defendant's motion to order plaintiff to post security for costs is considered a special appearance not indicating an intention to defend and therefore it does not call into play the 55(b) notice requirement. Sayers v. Colon, 73 F.R.D. 77 (D.V.I. 1976).

304. Such a judgment is voidable but not void. Winfield Associates, Inc. v. Stonecipher, 429 F.2d 1087, 1091 (10th Cir. 1970); Collex, Inc. v. Walsh, 74 F.R.D. 443, 447-48 (E.D. Pa. 1977); United States v. Martin, 395 F. Supp. 954, 961 (S.D.N.Y. 1975).

305. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Commercial Cas. Ins. Co. v. White Line Transfer & Storage Co., 114 F.2d 946 (8th Cir. 1940).

306. Winfield Assoc., Inc. v. Stonecipher, 429 F.2d 1087 (10th Cir. 1970); Rutland Transit Co. v. Chicago Tunnel Terminal Co., 233 F.2d 655 (7th Cir. 1956); Collex, Inc. v. Walsh, 74 F.R.D. 443 (E.D. Pa. 1977); United States v. Martin, 395 F. Supp. 954 (S.D.N.Y. 1975). Because the judgment is not void, it cannot be reopened under 60(b)(4), which is not subject to the one-year limitation applicable to the most common grounds for reopening. United States v. Manos, 56 F.R.D. 655 (S.D. Ohio 1972).

307. Klapprott v. United States, 335 U.S. 601 (discusses the application of the 60(b)(6) catchall), *modified*, 336 U.S. 942 (1949).

308. Annot., 144 A.L.R. 372, 383 (1943).

309. Savarese v. Edrick Transfer & Storage Inc., 513 F.2d 140 (9th Cir. 1975); Aviation Specialties, Inc. v. Thompson, 395 F.2d 199 (9th Cir. 1968); Duling v. Markun, 231 F.2d 833 (7th Cir.), cert. denied, 352 U.S. 870 (1956). See also, 6 Moore's Federal Practice ¶ 55.05[2] at 55-52 (2d ed. 1948). A default judgment also may be overturned on appeal if some other penalty would be more appropriate and less severe. Annot., 6 A.L.R. 3d 713, 729 (1966).

310. Wilson v. Moore and Associates, Inc., 564 F.2d 366 (9th Cir. 1977); Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Thorpe v. Thorpe, 364 F.2d 692 (D.C. Cir. 1966); Davis v. Parkhill-Goodloe Co., 302 F.2d 489 (5th Cir. 1962); Wilcox v. Triple D Corp., 78 F.R.D. 5 (E.D. Va. 1978) (the court was so anxious to dispose of the case on the merits that default would be set aside, if the defendant would reimburse the plaintiff for the costs incurred in obtaining the default, even though the defendant willfully delayed and there was prejudice to the plaintiff).

311. Turner v. Salvatierra, 580 F.2d 199 (5th Cir. 1978) (appellate court vacated default judgment primarily because rule 55(b) notice requirements were not followed, but also observed that defendant appeared to have a meritorious defense); Provident Security Life Ins. Co. v. Gorsuch, 323 F.2d 839 (9th Cir. 1963), cert. denied, 376 U.S. 950 (1964); Mannke v. Benjamin Moore & Co., 375 F.2d 281 (3d Cir. 1967); Lunderville v. Allen, 366 F.2d 445 (2d Cir. 1966); Phillips v. Flynn, 61 F.R.D. 574 (E.D. Pa. 1974).

312. The power to render an adverse judgment as a penalty for disobedience seems more restricted with respect to defendants. This is explainable in that the plaintiff, as the party seeking relief, has a duty to prosecute with diligence. Comment, supra note 180, at 923. The defendant is put to defense only and cannot be charged with neglect for failing to do more than meet the plaintiff step-by-step. Id.

313. See note 396 and accompanying text infra.

314. Geddes v. United Financial Group, 559 F.2d 557 (9th Cir. 1977).

315. Curry v. Jensen, 523 F.2d 387 (9th Cir.), cert. denied, 423 U.S. 998 (1975); Nash & Associates, Inc. v. Lum's of Ohio, Inc., 484 F.2d 392 (6th Cir. 1973). See also Danning v. Lavine, 572 F.2d 1386 (9th Cir. 1978).

316. Bridoux v. Eastern Airlines, Inc., 214 F.2d 207 (D.C. Cir.), cert. denied, 348 U.S. 821 (1954).

317. Gorsuch v. Provident Security Life Ins. Co., 392 F.2d 200 (9th Cir. 1968).

318. 357 U.S. 197 (1958). *See* text accompanying footnotes 376-90 *infra*.

319. *See* SEC v. Research Automation Corp., 521 F.2d 585 (2d Cir. 1975). A seeming exception is Walker v. Tilley Lamp Co., 467 F.2d 219 (3d Cir.), *cert. denied sub nom.* Eagle Star Ins. Group v. Walker, 409 U.S. 878 (1972), but the "interrogatories in attachment" involved in that case were provided for by state law (presumably made applicable to the case by Fed. R. Civ. P. 64), and not by Fed. R. Civ. P. 33.

320. Henry v. Sneiders, 490 F.2d 315 (9th Cir.), *cert. denied*, 419 U.S. 832 (1974); Eisler v. Stritzler, 535 F.2d 148 (1st Cir. 1967). *But cf.* Danning v. Lavine, 572 F.2d 1386 (9th Cir. 1978) (in which defendant refused to answer certain deposition questions even though ordered to do so by the court; finally, defendant sought and was granted permission to withdraw her answer to the complaint and submit to default rather than answer the deposition questions).

321. Proper service need not be personal service if there is proper in rem jurisdiction. Wong Shing v. M/V Mardina Trader, 564 F.2d 1183 (5th Cir. 1977); Jacobs v. Tenney, 316 F. Supp. 151 (D. Del. 1970). If service has been improper the defendant is entitled under rule 60(b)(4) to set aside a default judgment. Di Cesare-Engler Productions, Inc. v. Mainman Ltd., 81 F.R.D. 703 (W.D. Pa. 1979); Thorne v. Pennsylvania, 77 F.R.D. 396 (E.D. Pa. 1977).

322. For a particularly rapid passage through these steps *see* Wilbur v. Arkuszewski, 52 F.R.D. 291 (E.D. Tenn. 1970).

323. United States v. Borchardt, 470 F.2d 257 (7th Cir. 1972).

324. Curry v. Jensen, 523 F.2d 387 (9th Cir.), *cert. denied*, 423 U.S. 998 (1975); Vega Matta v. Alvarez de Choudens, 440 F. Supp. 246 (D.P.R. 1977), *aff'd without opinion*, 577 F.2d 722 (1st Cir. 1978); Spica v. Garczynski, 78 F.R.D. 134 (E.D. Pa. 1978); Phillips v. Flynn, 61 F.R.D. 574 (E.D. Pa. 1974); Schartner v. Copeland, 59 F.R.D. 653 (M.D. Pa.), *aff'd without opinion*, 487 F.2d 1395 (3d Cir. 1973).

325. Draisner v. Liss Realty Co., Inc., 211 F.2d 808 (D.C. Cir.), *cert. denied*, 348 U.S. 877 (1954).

326. 335 U.S. 601 (1949).

327. Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970).

328. Design & Development, Inc. v. Vibromatic Mfg., Inc., 58 F.R.D. 71 (E.D. Pa. 1973). *See also* Barber v. Turberville, 218 F.2d 34 (D.C. Cir. 1954), in which a woman who was being sued for alienating the affections of the plaintiff's husband turned over the summons to the attorney who was representing the husband in a divorce suit by the same plaintiff.

329. Phillips v. Flynn, 61 F.R.D. 574 (E.D. Pa. 1974).

330. Schartner v. Copeland, 59 F.R.D. 653 (M.D. Pa. 1973).

331. United States v. Borchardt, 470 F.2d 257 (7th Cir. 1972).

332. Design & Development, Inc. v. Vibromatic Mfg., Inc., 58 F.R.D. 71 (E.D. Pa. 1973). The defense must be set forth with particularity. Gomes v. Williams, 420 F.2d 1364 (10th Cir. 1970).

333. In Hughes v. Holland, 320 F.2d 781 (D.C. Cir. 1963), a default judgment was affirmed on the ground of defendant's lack of diligence without reference to the existence or nonexistence of a meritorious defense. In Rutland Transit Co. v. Chicago Tunnel Terminal Co., 223 F.2d 655 (7th Cir. 1956), the court stated that defendant's "inexcusable neglect" made it unnecessary to consider whether there was a meritorious defense; it seemed, however, that no meritorious defense existed.

334. Broglie v. Mackay-Smith, 75 F.R.D. 739 (W.D. Va. 1977); Schartner v. Copeland, 59 F.R.D. 653 (M.D. Pa.), *aff'd without opinion*, 487 F.2d 1395 (3d Cir. 1973); Morisse v. Defensive Instruments, Inc., 55 F.R.D. 433 (E.D. Wis. 1972).

335. Bonanza Int'l, Inc. v. Corceller, 480 F.2d 613 (5th Cir.), *cert. denied*, 414 U.S. 1073 (1973); Draisner v. Liss Realty Co., Inc., 211 F.2d 808 (D.C. Cir.), *cert. denied*, 348 U.S. 877 (1954).

336. Schartner v. Copeland, 59 F.R.D. 653 (M.D. Pa.), *aff'd without opinion*, 487 F.2d 1395 (3d Cir. 1973).

337. United States v. Martin, 395 F. Supp. 954 (S.D.N.Y. 1975); Morisse v. Defensive Instruments, Inc., 55 F.R.D. 433 (E.D. Wis. 1972).

338. Missouri *ex rel.* De Vault v. Fidelity & Casualty Co., 107 F.2d 343 (8th Cir. 1939); Midland Engineering Co. v. John A. Hall Construction Co., 198 F. Supp. 981 (N.D. Ind. 1975).

339. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Mannke v. Benjamin Moore & Co., 375 F.2d 281 (3d Cir. 1967); Midland

Engineering Co. v. John A. Hall Construction Co., 398 F. Supp. 981 (N.D. Ind. 1975).

340. Charlton L. Davis & Co. P.C. v. Fedder Data Center, 556 F.2d 308, 309 (5th Cir. 1977): "The Plaintiff sought to reap tactical advantage from [defendant's] prior neglect by acquiring a stealth decision sheltered by the rules which protect final judgments."

341. Zaro v. Strauss, 167 F.2d 218 (5th Cir. 1948); see notes 296-306 and accompanying text supra.

342. Thorpe v. Thorpe, 364 F.2d 692 (D.C. Cir. 1966).

343. Provident Security Life Ins. Co. v. Gorsuch, 323 F.2d 839 (9th Cir. 1963), cert. denied, 376 U.S. 950 (1964); cf. Missouri ex rel. De Vault v. Fidelity & Casualty Co., 107 F.2d 343 (8th Cir. 1939) (demurrer).

344. Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973).

345. Lau Ah Yew v. Dulles, 236 F.2d 415 (9th Cir. 1956); Camp v. Guercio, 464 F. Supp. 343 (W.D. Pa. 1979); Midland Engineering Co. v. John A. Hall Construction Co., 398 F. Supp. 981 (N.D. Ind. 1975); Georgia Power Project v. Georgia Power Co., 409 F. Supp. 332 (N.D. Ga. 1975).

346. SEC v. Research Automation Corp., 521 F.2d 585 (2d Cir. 1975).

347. Rutland Transit Co. v. Chicago Tunnel Terminal Co., 233 F.2d 655 (7th Cir. 1956).

348. United States v. Manos, 56 F.R.D. 655 (S.D. Ohio 1972). Cf. Collex, Inc. v. Walsh, 74 F.R.D. 443 (E.D. Pa. 1977) in which defendant brought, unsuccessfully, a second 60(b) motion, raising matters he had omitted on the first one.

349. Savarese v. Edrick Transfer & Storage, Inc., 513 F.2d 140 (9th Cir. 1975). Cf. United States v. One 1966 Chevrolet Pickup Truck, 56 F.R.D. 459 (E.D. Tex. 1972) in which, due to ignorance of supplemental rules governing forfeiture actions, claimant's attorney failed to file a second claim and answer, and a default judgment was entered without notice; motion to vacate was granted.

350. Aviation Specialists, Inc. v. Thompson, 395 F.2d 199 (9th Cir. 1968); Mannke v. Benjamin Moore & Co., 375 F.2d 281 (3d Cir. 1967); Davis v. Parkhill-Goodloe Co., 302 F.2d 489 (5th Cir. 1962). Note that within the time prescribed by rule 12(a) defendant must serve the answer on plaintiff or plaintiff's attorney. Filing with the court must be done "within a reason-

able time thereafter." Rule 5(d). Boyd v. Jordan, 60 F.R.D. 203 (E.D.N.C. 1973).

351. Midland Engineering Co. v. John A. Hall Construction Co., 398 F. Supp. 981 (N.D. Ind. 1975).

352. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Duling v. Markun, 231 F.2d 833 (7th Cir.), *cert. denied*, 352 U.S. 870 (1956); Kennerly v. Aro, Inc., 447 F. Supp. 1083 (E.D. Tenn. 1976); Singer Co. v. Greever and Walsh Wholesale Textile, Inc., 82 F.R.D. 1 (E.D. Tenn. 1977); Johnson v. Harper, 66 F.R.D. 103 (E.D. Tenn. 1975); Hamilton v. Edell, 67 F.R.D. 18 (E.D. Pa. 1975).

353. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

354. Aviation Specialties, Inc. v. Thompson, 395 F.2d 199 (9th Cir. 1968). *Cf.* McGrady v. D'Andrea Electric, Inc., 434 F.2d 1000 (5th Cir. 1970) (a late and irregular answer compounded by absence from a pretrial conference).

355. *See* Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Davis v. Parkhill-Goodloe Co., 302 F.2d 489 (5th Cir. 1962); Midland Engineering Co. v. John A. Hall Construction Co., 398 F. Supp. 981 (N.D. Ind. 1975).

356. *See* Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Mannke v. Benjamin Moore & Co., 375 F.2d 281 (3d Cir. 1967); Singer Co. v. Greever and Walsh Wholesale Textile, Inc., 82 F.R.D. 1 (E.D. Tenn. 1977); Johnson & Harper, 66 F.R.D. 103 (E.D. Tenn. 1975); Midland Engineering Co. v. John A. Hall Construction Co., 398 F. Supp. 981 (N.D. Ind. 1975); Hamilton v. Edell, 67 F.R.D. 18 (E.D. Pa. 1975).

357. *See* Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Davis v. Parkhill-Goodloe Co., 302 F.2d 489 (5th Cir. 1962); Kennerly v. Aro, Inc., 447 F. Supp. 1083, 1089 (E.D. Tenn. 1976).

358. *See* Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Mannke v. Benjamin Moore & Co., 375 F.2d 281 (3d Cir. 1967); Hamilton v. Edell, 67 F.R.D. 18 (E.D. Pa. 1975).

359. Default judgments were reversed as too drastic in Bridoux v. Eastern Airlines, Inc., 214 F.2d 207 (D.C. Cir.), *cert. denied*, 348 U.S. 821 (1954), and E.F. Hutton & Co. v. Moffatt, 460 F.2d 284 (5th Cir. 1972). In McGrady v. D'Andrea Electric, Inc., 434 F.2d 1000 (5th Cir. 1970), and Aberson v. Glassman, 70 F.R.D. 683 (S.D.N.Y. 1976), default judgments were affirmed, but other considerations were present.

360. J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976).

361. Shapiro, Bernstein & Co. v. Continental Record Co., 386 F.2d 426 (2d Cir. 1967).

362. Bass v. Hoagland, 172 F.2d 205 (5th Cir.), *cert. denied*, 338 U.S. 816 (1949).

363. 96 Ariz. 325, 395 P.2d 527 (1964).

364. Magette v. Daily Post, 535 F.2d 856 (3d Cir. 1976) (in which trial court proceeded with trial in the absence of defendants, entered a default judgment which was vacated upon motion by defendant, and then granted a new trial on the issue of liability only; appellate court vacated assessment of damages since a full hearing was not held and ordered a new trial on the issue of damages only); Tartaglia v. Del Papa, 48 F.R.D. 292 (E.D. Pa. 1969) (in which the trial court said that because there was no motion by plaintiff for default judgment, there was no default for the purposes of rule 55(b) notice procedures and that the use of default judgment served merely as a technical designation because of defendant's nonappearance); Commercial Casualty Ins. Co. v. White Line Transfer & Storage Co., Inc., 114 F.2d 946 (8th Cir. 1940) (per curiam) (where trial court heard evidence and made findings before entering default judgment; appellate court reversed stating that the violation of rule 55(b) notice procedures prevented plaintiff from having the hearing and fair trial which is the purpose of the rule).

365. Magette v. Daily Post, 535 F.2d 856 (3d Cir. 1976).

366. Moldwood Corp. v. Stutts, 410 F.2d 351 (5th Cir. 1969); *accord* American & Foreign Ins. Ass'n v. Commercial Ins. Co., 575 F.2d 980 (1st Cir. 1978).

367. *See* notes 150-161, 285-289 and accompanying text *supra*.

368. Barber v. Turberville, 218 F.2d 34 (D.C. Cir. 1954); Broglie v. Mackay-Smith, 75 F.R.D. 739 (W.D. Va. 1977); Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973). *Cf*. Luis C. Forteza E. Jijos, Inc. v. Mills, 534 F.2d 415 (1st Cir. 1976) (defendant fails to cooperate with counsel); Aberson v. Glassman, 70 F.R.D. 683 (S.D.N.Y. 1976) (court disbelieves defendant's attempt to blame counsel).

369. Savarese v. Edrick Transfer & Storage, Inc., 513 F.2d 140 (9th Cir. 1975); Aberson v. Glassman, 70 F.R.D. 683 (S.D.N.Y. 1976).

370. Thorpe v. Thorpe, 364 F.2d 692 (D.C. Cir. 1966).

371. E.F. Hutton & Co., Inc. v. Moffatt, 460 F.2d 284 (5th Cir. 1972). *Cf*. SEC v. Research Automation Corp., 521 F.2d 585

(2d Cir. 1975) (defendant unaware that corporation must appear by counsel).

372. Savarese v. Edrick Transfer & Storage, Inc., 513 F.2d 140 (9th Cir. 1975); Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973); United States v. One 1966 Chevrolet Pickup Truck, 56 F.R.D. 459 (E.D. Tex. 1972).

373. Barber v. Turberville, 218 F.2d 34 (D.C. Cir. 1954); Hamilton v. Edell, 67 F.R.D. 18 (E.D. Pa. 1975). But see Spica v. Garczynski, 78 F.R.D. 134 (E.D. Pa. 1978), in which defendant took the complaint to his insurance company; the complaint was erroneously filed and no answer was made. Default was entered, and when defendant moved three months later to set aside the default, the motion was denied. The court said that intraoffice confusion is not excusable neglect or justification for the three-month delay in filing the motion.

374. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969); Phillips v. Flynn, 61 F.R.D. 574 (E.D. Pa. 1974).

375. E.F. Hutton & Co., Inc. v. Moffatt, 460 F.2d 284 (5th Cir. 1972).

376. Societe Internationale v. Rogers, 357 U.S. 197 (1958).

377. Rosenberg, supra note 3, at 483-86.

378. 357 U.S. 197 (1958).

379. See, e.g., Rosenberg, supra note 3, at 483; Developments in the Law--Discovery, supra note 3, at 988; Comment, supra note 17, at 281.

380. Comment, supra note 17, at 281.

381. 357 U.S. at 198.

382. Id. at 206. Prior to 1958, use of the inherent power concept to augment and buttress the authority of explicit rules provisions that were themselves sufficient to dispose of the issue was considered a valid exercise of judicial power. Recent Decisions, 62 Colum. L. Rev. 187, 190 (1962).

383. 357 U.S. at 206.

384. Note, Federal Procedure: Due Process Limitations on Discovery Sanctions, 46 Calif. L. Rev. 836, 839 (1958).

385. 357 U.S. at 207.

386. Id.

387. 62 Colum. L. Rev., supra note 382, at 190.

388. Id. at 192.

389. Proposed 1967 Amendments to the Federal Discovery Rules, supra note 6, at 294.

390. Id.

391. See notes 99-106 and accompanying text supra.
Fed. R. Civ. P. 36 provides as follows:

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or admendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

392. See Hadra v. Herman Blum Consulting Engineers, 74 F.R.D. 113 (N.D. Tex. 1977), in which the party did not want to respond to a request until a key employee returned. However, if this were allowed, the requesting party would be prejudiced because there would then be little time to make its own proof, if necessary. The court, in striking a balance, ordered the responding party to submit a list of all the requests with evidence presently known to it which would serve as a basis for disputing an admission. Anything which could not be met with substantial argument would be deemed admitted. The rest of the requests, which might merit dispute, could wait until the key employee returned.

393. Creedon v. Howle, 8 F.R.D. 92 (N.D. Ohio 1948); Chicago, Rock Island & Pacific R.R. Co. v. Williams, 245 F.2d 397 (8th Cir.), cert. denied, 355 U.S. 855 (1957); Adventures in Good Eating v. Best Places to Eat, Inc., 131 F.2d 809 (7th Cir. 1942).

394. Admissions were allowed to be contested at trial in: Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252 (N.D. Ind. 1977); United States v. Lemons, 125 F. Supp. 686 (W.D. Ark. 1954); Demmert v. Demmert, 115 F. Supp. 430 (D. Alaska 1953); Kraus v. General Motors Corp., 29 F. Supp. 430 (S.D.N.Y. 1939). Cf. DeLeon v. Ramirez, 465 F. Supp. 698 (S.D.N.Y. 1979) (in which plaintiff moved for partial summary judgment based on defendant's failure to respond to plaintiff's rule 36 requests; the court held that the requests would be taken as admitted only insofar as they were left uncontroverted by the defendant's opposing affidavit). But in McSparran v. Hanigan, 225 F. Supp. 628 (E.D. Pa. 1963), aff'd, 356 F.2d 983 (3d Cir. 1966), the district court stated that a request for admission answer is a "studied re-

sponse"; and because requests for admission deal with facts and not the evidentiary circumstances which establish the facts, once admitted, the matter must remain admitted regardless of evidence to the contrary. See also Pickens v. Equitable Life Assurance Soc'y of United States, 413 F.2d 1390 (5th Cir. 1969), in which an inadvertent nonreply to one of several requests for admission was not deemed admitted but was regarded as an evidential admission for the jury to consider. Here again, the court wished to balance justice with technical rules.

395. Only one of the fourteen court of appeals decisions studied reversed on the ground that the trial court had been too lenient in not imposing the consequences dictated by rule 36. Woods v. Stewart, 171 F.2d 544 (5th Cir. 1948). Even in that case the discretion of the lower court was not greatly undermined. The higher court still allowed the failing party a reasonable time to correct its response before the sanction of deeming the matter admitted would be imposed.

396. In the cases we have studied, the Ninth and usually the Eighth Circuits have been consistently lenient in accepting almost any reason for not replying or replying incorrectly to requests for admission. See Bowers v. E.J. Rose Mfg. Co., 149 F.2d 612 (9th Cir.), cert. denied, 326 U.S. 753 (1945); Pleasant Hill Bank v. United States, 60 F.R.D. 1 (W.D. Mo. 1973); United States v. Wheeler, 161 F. Supp. 193 (W.D. Ark. 1958); Kelley v. Harris, 158 F. Supp. 243 (D. Mont. 1958). The Ninth Circuit has also been innovative in using the "balancing approach" to applying sanctions as mentioned above. See, e.g., Jackson v. Kotzebue Oil Sales, 17 F.R.D. 204 (D. Alaska 1955); Demmert v. Demmert, 115 F. Supp. 430 (D. Alaska 1953). Other circuits apply the rule's sanction more stringently. The Fourth Circuit and the district courts of Pennsylvania accept only the most persuasive excuses which allege no fault on the part of the failing party. Southern Ry. Co. v. Crosby, 201 F.2d 878 (4th Cir. 1953); Weva Oil Corp. v. Belco Petroleum Corp., 68 F.R.D. 663 (N.D. W.Va. 1975); Freed v. Plastic Packaging Materials, Inc., 66 F.R.D. 550 (E.D. Pa. 1975); Villarosa v. Massachusetts Trustees of Eastern Gas & Fuel Ass'n, 39 F.R.D. 337 (E.D. Pa. 1966); United States v. Laney, 96 F. Supp. 482 (E.D.S.C. 1951). The Seventh Circuit has declared a policy of strictly construing and rigidly enforcing the rule's requirement that a denial must specifically meet the substance of the request for admission. United States v. Jefferson Trust and Savings Bank, 31 F.R.D. 137 (S.D. Ill. 1962). In this circuit, therefore, inadequate responses are always deemed to be an admission. There are also inconsistencies within individual courts which sometimes make it difficult to predict exactly which excuses will be accepted. For example, the District Court for the Eastern District of Pennsylvania decided in Woods v. Whelan, 93 F. Supp. 401 (E.D. Pa. 1950), that no reply would be deemed an admission even though that meant summary judgment against the party not answering; a few years later it

decided the opposite in Frankel v. International Scrap Iron and Metal Co., 157 F. Supp. 709 at 713-714 (E.D. Pa. 1957). Here, with similar facts, the court said that a "decision should not be based on mere matters of pleadings or technical admission . . . the purpose of pleading is to facilitate a proper decision on the merits."

397. *See, e.g.*, Jackson v. Riley Stoker Corp., 57 F.R.D. 120 (E.D. Pa. 1972); Rackley v. Board of Trustees of Orangeburg Reg. Hosp., 238 F. Supp. 512 (E.D.S.C. 1965); and Mountcastle v. United States, 226 F. Supp. 706 (M.D. Tenn. 1963).

398. Excuses were not accepted and matters were deemed admitted by the court in United States v. Natale, 99 F. Supp. 102 (D. Conn. 1950) (interrogatories on the same subject already asked and denied); United States *ex rel*. v. Wiman, 304 F.2d 53 (5th Cir. 1962) (the subject of the request would not have been admissible in court), *cert. denied*, 372 U.S. 915 (1963), *cert. denied*, 372 U.S. 924 (1963); Kraus v. General Motors Corp., 29 F. Supp. 430 (S.D.N.Y. 1939) (no time limits given for reply in the request itself); Smyth v. Kaufman, 114 F.2d 40 (2d Cir. 1940) (it was believed that requests for admission applied only to documents and not to other facts of the case); Driver v. Gindy Manufacturing Corp., 24 F.R.D. 473 (E.D. Pa. 1959) (it was believed that the case would be removed to another jurisdiction); Luick v. Graybar Electric Co., Inc., 473 F.2d 1360 (8th Cir. 1973) (it was believed that the party's surety, a third-party defendant, need not respond). When a party believed that the request for admission asked for information outside of his knowledge it was no excuse when the party was wrong in his contention. United States *ex rel*. v. Wiman, 304 F.2d 53 (5th Cir. 1962). But when the court agreed that the request asked for too much, the excuse was allowed. Sladek v. General Motors Corp., 16 F.R.D. 104 (S.D. Iowa 1954).

399. Woods v. Robb, 171 F.2d 539 (5th Cir. 1948).

400. If a request is mailed to the party's last known address it will be deemed sufficient service by the court. Requests not denied or objected to will then be taken as admitted, whether or not they were received. *Compare* *In re* Mack, 330 F. Supp. 737 (S.D. Tex. 1970), with United States v. Brandt, 8 F.R.D. 163 (D. Mont. 1948). Service of requests for admission on a party's wife is also sufficient. Miller Studio Inc. v. Pacific Import Co., 39 F.R.D. 62 (S.D.N.Y. 1965). When a party is one of several defendants and does not receive a request for admission individually, United States v. Wheeler, 161 F. Supp. 193 (W.D. Ark. 1958), or when a party is not notified of the request by his co-defendants, he or she will be excused by the court since the nonresponse was inadvertent (Ark.-Tenn. Distrib. Corp. v. Breidt, 110 F. Supp. 644 (D.N.J. 1953), *aff'd*, 209 F.2d 359 (3d Cir. 1954)). The court is less inclined to be lenient when the non

response could have been prevented had the party taken "practicable precautions." Thus, when a party refused to accept requests for admission sent by registered mail, it was no excuse even though she did not know what they were and was in the process of getting a new lawyer, Creedon v. Howle, 8 F.R.D. 92 (N.D. Ohio 1948); and when a party received several extensions of time to respond to the requests, it was no excuse that he had not yet procured counsel, United States v. Skalsky, 71 F.R.D. 564 (E.D. Pa. 1976), aff'd without opinion, 556 F.2d 570 (3d Cir. 1977).

401. Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686 (2d Cir. 1966); Westmoreland v. Triumph Motorcycle Corp., 71 F.R.D. 192 (D. Conn. 1976); Freed v. Plastic Packaging Materials, Inc., 66 F.R.D. 550 (E.D. Pa. 1975). If prejudice will result, the late answer is not allowed. Goodman v. Neff, 251 F. Supp. 565 (E.D. Pa. 1966).

402. Jackson v. Kotzebue Oil Sales, 17 F.R.D. 204 (D. Alaska 1955); Hopsdal v. Loewenstein, 7 F.R.D. 263 (N.D. Ill. 1945).

403. French v. United States, 416 F.2d 1149 (9th Cir. 1968).

404. Williams v. Krieger, 61 F.R.D. 142 (S.D.N.Y. 1973).

405. Brust v. Industrial Bank of Commerce, 18 F.R.D. 90 (S.D.N.Y. 1955). But lack of familiarity with the rules is only a good excuse when the lawyer is not negligent in not knowing the rules. See Sieb's Hatcheries v. Lindley, 13 F.R.D. 113 (W.D. Ark. 1952).

406. Bowers v. E.J. Rose Mfg. Co., 149 F.2d 612 (9th Cir.), cert. denied, 326 U.S. 753 (1945). Similarly, when a party forgot to formally notify his adversary that he had a new attorney, so that requests were not sent to the correct place, late responses were allowed. Kelley v. Harris, 158 F. Supp. 243 (D. Mont. 1958).

407. Weva Oil Corp. v. Belco Petroleum Corp., 68 F.R.D. 663 (N.D. W.Va. 1975).

408. Shapiro, Bernstein & Co., Inc. v. "Log Cabin Club Ass'n," 365 F. Supp. 325 (N.D. W.Va. 1973).

409. Jackson v. Kotzebue Oil Sales, 17 F.R.D. 204 (D. Alaska 1955).

410. When an answer both admitted and denied the same request the answer was deemed an admission. Riordan v. Ferguson, 147 F.2d 983 (2d Cir. 1945); and when a party did not provide details as to why he could not admit or deny the request, the

facts were also deemed admitted without a chance to amend. Villarosa v. Massachusetts Trustees of Eastern Gas & Fuel Ass'n, 39 F.R.D. 337 (E.D. Pa. 1966).

411. *See* Havenfield Corp. v. H&R Block, Inc., 67 F.R.D. 93 (W.D. Mo. 1973); Merriman v. Broderick, 38 F. Supp. 13 (D.R.I. 1941). The determination of whether or not an answer is argumentative can sometimes lead the court into battles about semantics. A party who "refuses to admit" a fact (using those words) may be admitting it, Southern Ry. Co. v. Crosby, 201 F.2d 878 (4th Cir. 1953), or may be explaining why he cannot truthfully admit or deny the statement, Adley Express Co. v. Highway Truck Drivers & Helpers Local No. 107, 349 F. Supp. 436 (E.D. Pa. 1972), depending upon the court's interpretation.

If the word "deny" is qualified by a statement that the answerer has no knowledge as to the matter requested to be admitted, the request is deemed admitted, even though the answerer has denied it. Dulansky v. Iowa-Illinois Gas & Electric Co., 92 F. Supp. 118 (S.D. Iowa 1950).

412. The excuse of lack of information necessary to respond to the request is allowed if the party answering can show good faith. That is, the court must be persuaded that the request is asking for too much or else that a reasonable inquiry has been made, and still the party cannot answer. City of Rome v. United States, 450 F. Supp. 378 (D.D.C. 1978), *appeal pending*, 443 U.S. 914 (1979); Lumpkin v. Meskill, 64 F.R.D. 673 (D. Conn. 1974); Fuhr v. Newfoundland-St. Lawrence Shipping Ltd., 24 F.R.D. 9 (S.D.N.Y. 1959).

413. The courts were especially lenient when the Federal Rules of Civil Procedure were new and when new amendments were added to the rules. During these times, inadequate answers could be revised. Lumpkin v. Meskill, 64 F.R.D. 673 (D. Conn. 1974); Walsh v. Connecticut Mutual Life Ins. Co., 26 F. Supp. 566 (E.D.N.Y. 1939).

414. The courts are somewhat arbitrary in favoring one type of response over another. If a party's answer is inadequate because it is not specific enough, the court most often deems an admission, but if the party does not answer at all, or answers late, the court is often lenient in allowing the answer. *Compare* French v. United States, 416 F.2d 1149 (9th Cir. 1968); Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686 (2d Cir. 1966); Westmoreland v. Triumph Motorcycle Corp., 71 F.R.D. 192 (D. Conn. 1976); Sladek v. General Motors Corp., 16 F.R.D. 104 (S.D. Iowa 1954); *and* Frankel v. International Scrap and Iron Metal Co., 157 F. Supp. 709 (E.D. Pa. 1957), *with* Princess Pat, Ltd. v. National Carloading Corp., 223 F.2d 916 (7th Cir. 1955); Riordan v. Ferguson, 147 F.2d 983 (2d Cir. 1945); Havenfield Corp. v. H&R Block, Inc., 67 F.R.D. 93 (W.D. Mo. 1973); *and* United States v. Laney, 96 F. Supp. 482 (E.D.S.C. 1951).

Therefore, it seems that one can be penalized for answering incorrectly more often than for neglecting to answer at all, even if no prejudice exists in either situation. Perhaps a reason behind this seeming incongruence is that the court wishes to prevent easy or casual denials to rule 36 requests. This varied response was also found in the treatment of unsworn responses before the 1970 amendment doing away with the requirement of swearing. In all but one of the cases in which the court regarded the unsworn answer as insufficient, the party was not allowed to amend it by adding the oath. Compare Woods v. Stewart, 171 F.2d 544 (5th Cir. 1948) with Villarosa v. Massachusetts Trustees of Eastern Gas & Fuel Ass'n, 39 F.R.D. 337 (E.D. Pa. 1966) and United States v. Laney, 96 F. Supp. 482 (E.D.S.C. 1951). However, in most cases in which the unsworn answer was regarded as no answer at all, the party would be allowed to swear to it later. See Hopsdal v. Loewenstein, 7 F.R.D. 263 (E.D. Ill. 1945).

415. Recently, a court granted a motion to compel discovery following defendant's refusal to admit or deny the matters set forth in plaintiff's requests for admission. The defendant declined to admit or deny because the information had never been compiled and was as available to the plaintiff as to the defendant. Since the purpose of requests for admission is to narrow the issues for trial, the court found defendant's response inadequate and granted plaintiff's motion to compel. Webb v. Westinghouse Electric Corp., 81 F.R.D. 431 (E.D. Pa. 1978).

416. "Straddling statements" were rejected by the court as an excuse in Princess Pat, Ltd. v. National Carloading Corp., 223 F.2d 916 (7th Cir. 1955), when the response was presented for the second time.

417. Fed. R. Civ. P. 11 provides as follows:

> Signing of Pleadings
>
> Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule of statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been

> served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

If there is an attorney of record, pleadings must be signed by him. A party represented by an attorney may not file pleadings pro se; papers not signed by a party's attorney need not be responded to. Ahmad v. Independent Order of Foresters, 81 F.R.D. 722 (E.D. Pa. 1979).

The requirement that a party appearing pro se must sign the pleadings is to assure that persons named actually assent to the filing of the pleading. When there are multiple pro se parties all must sign the pleadings. One party may not sign as the representative of the others; Rule 11 authorizes only lawyers to act in that way in federal court. A complaint signed by only one of several plaintiffs will be dismissed as to the nonsigning plaintiffs. People *ex rel*. Snead v. Kirkland, 462 F. Supp. 914 (E.D. Pa. 1978). A notice of appeal signed by only one party will be dismissed as to the nonsigning parties. Scarrella v. Midwest Federal Savings & Loan, 536 F.2d 1207 (8th Cir.), *cert. denied*, 429 U.S. 885 (1976); McKinney v. De Bord, 507 F.2d 501 (9th Cir. 1974).

418. It has been held that rule 11 does not apply to motions. Entertaining motions to strike other motions would unduly complicate the court's proceedings. Medusa Portland Cement Co. v. Peal Assur. Co., 5 F.R.D. 332 (N.D. Ohio 1945).

However, rule 11 provides that "similar action may be taken if scandalous or indecent matter is inserted" and in Payne v. Howard, 75 F.R.D. 465 (D.D.C. 1977), the court struck as "indecent" and "scandalous" certain papers filed in support of a motion to compel discovery. The court noted that the stricken material was not a pleading but stated that rule 11 affords a basis for striking material other than formal pleadings.

419. Holley Coal Co. v. Globe Indemnity Co., 186 F.2d 291 (4th Cir. 1950).

420. Bertucelli v. Carreras, 467 F.2d 214 (9th Cir. 1972).

421. Incomco v. Southern Bell Telephone & Telegraph Co., 558 F.2d 751 (5th Cir. 1977).

422. Freeman v. Kirby, 27 F.R.D. 395 (S.D.N.Y. 1961).

423. Oklahoma Publishing Co. v. Walsh, 579 F.2d 66 (10th Cir.), *cert. denied*, 439 U.S. 863 (1978).

424. Lau Ah Yew v. Dulles, 236 F.2d 415 (9th Cir. 1956).

425. United States v. Long, 10 F.R.D. 443 (D. Neb. 1950).

426. American Automobile Ass'n, Inc. v. Rothman, 104 F. Supp. 655 (E.D.N.Y. 1952); In re Lavine, 126 F. Supp. 39 (S.D. Cal. 1954), rev'd sub nom. In re Los Angeles County Pioneer Soc'y, 217 F.2d 190 (9th Cir. 1954). In Nemeroff v. Abelson, 469 F. Supp. 630 (S.D.N.Y. 1979), the court assessed defendant's attorney's fees against both the plaintiff and his attorney for bringing an action in bad faith. But in United States v. Standard Oil Co. of Cal., 603 F.2d 100 (9th Cir. 1979), the court noted that rule 11 provides no authority for awarding attorneys' fees against an unsuccessful litigant. The court stated that Nemeroff applies the principle of awarding attorneys' fees against a plaintiff who acts in bad faith, an exception to the general rule that in the absence of a statute or an enforceable contract, the prevailing party cannot collect attorneys' fees from the loser.

427. Fed. R. Civ. P. 16 provides as follows:

Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: (1) the simplification of the issues; (2) the necessity or desirability of amendments to the pleadings; (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof; (4) the limitation of the number of expert witnesses; (5) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be jury; (6) such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

428. Identiseal Corp. of Wisconsin v. Positive Identification Systems, Inc., 560 F.2d 298 (7th Cir. 1977); McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976) (local rule); Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961). Cf. J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976) (no duty to stipulate to facts; therefore, appellate court reversed trial court's sanction against plaintiff for refusal to stipulate).

429. Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323 (5th Cir. 1968), cert. denied, 393 U.S. 1050 (1969). Cf. Buffington v. Wood, 351 F.2d 292 (3d Cir. 1965) (court may

require under rule 16 an exchange of medical reports not provided for in rule 35. In Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961), Judge Clark leaves open the possibility of calling for such a statement).

430. Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F.2d 323 (5th Cir. 1968), cert. denied, 393 U.S. 1050 (1969); Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910 (2d Cir. 1959). But the latter case points out that rule 16 gives no authority for a dismissal not warranted by rule 41(b).

431. Compare Jones v. Union Auto. Indem. Ass'n of Bloomington, Ill., 287 F.2d 27 (10th Cir. 1961) with Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910 (2d Cir. 1959). This possibility also is left open in Padovani v. Bruchhausen, 293 F.2d 546 (2d Cir. 1961).

432. For a general discussion of local rules governing discovery see Cohn, supra note 2.

433. See Truncale v. Universal Pictures Co., 82 F. Supp. 576 (S.D.N.Y. 1949); Adams v. Jarka Corp., 8 F.R.D. 571 (S.D.N.Y. 1948). Both cases concerned a local rule which called for dismissal of a case if service of process was not completed within the designated time period. The court upheld the rule, finding it not to be in conflict with Fed. R. Civ. P. 41(b). The following table lists district courts with similar local rules:

District Court	Local Rule No.	Time Limit for Service
1. Arizona	38(c)	1 year
2. N.D. Cal.	235(11)	40 days
3. N.D. Ga.	130	60 days
4. Maine	28(a)	3 months
5. Md.	33B	60 days
6. S.D. Tex.	15B	90 days
7. W.D. Tex.	18	60 days
8. N.D. Tex.	3.1(d)	90 days
9. E.D. Wis.	10	6 months

(A 1969 amendment to the Southern District of New York's local rules makes lack of service of process no longer grounds to dismiss a case.)

434. See Ballew v. Southern Pacific Co., 428 F.2d 787 (9th Cir. 1970); Rovner v. Warner Bros. Pictures, Inc., 29 F.R.D. 488 (E.D. Pa. 1962). The table shows which district courts have local rules calling for dismissal for lack of prosecution:

	District Court	Local Rule No.	Time Period of Inaction Allowed Before Dismissal Proceedings Begin
1.	Alaska	24	1 year
2.	Arizona	38(d)	1 year
3.	C.D. Cal.	10	a reasonable time
4.	N.D. Cal.	235(11)	4 months
5.	Colorado	19	judge's discretion
6.	D.C.	1-14	judge's discretion
7.	Delaware	12	
8.	S.D. Fla.	13	3 months
9.	N.D. Fla.	13	3 months
10.	M.D. Fla.	3.10	judge's discretion
11.	N.D. Ga.	130	6 months
12.	S.D. Ga.	15	a reasonable time
13.	Hawaii	6	6 months
14.	Idaho	8 b	1 year
15.	N.D. Ill.	G.R.21(a)	6 months
16.	N.D. Ind.	10	1 year
17.	Kansas	26	judge's discretion
18.	E.D. La.	12.1 & 12.2	6 months
19.	M.D. La.	13	6 months
20.	N.D. La.	14	1 year
21.	Mass.	22	2 years
22.	Maine	28(c)	judge's discretion
23.	Md.	33A	1 year
24.	E.D. Mich.	X	a reasonable time
25.	W.D. Mich.	8	6 months
26.	E.D. Mo.	15	15 months
27.	Nebraska	22	1 year
28.	Nevada	22	1 year
29.	N.H.	21	2 years
30.	N.J.	30	6 months
31.	N. Mex.	15	3 months
32.	E.D.N.Y.	8	judge's discretion
33.	N.D.N.Y.	11	1 year
34.	S.D.N.Y.	G.R. 23	1 year
35.	W.D.N.Y.	11	1 year
36.	S.D. Ohio	3.15	1 year
37.	N.D. Okla.	32	1 year
38.	Oregon	29	judge's discretion
39.	E.D. Pa.	23	1 year
40.	R.I.	21	judge's discretion
41.	W.D. Tenn.	13	judge's discretion
42.	W.D. Tex.	18	1 year
43.	E.D. Wash.	15	6 months
44.	W.D. Wash.	C.R. 41(b)	1 year
45.	N.D. W.Va.	2.09	1 year
46.	S.D. W.Va.	C.R. 2.07	judge's discretion
47.	W.D. Wisc.	15	1 year
48.	Wyoming	12	6 months

435. See N.D. Cal., rule 250, and E.D.N.Y., rule 8.

436. This table shows which district courts impose sanctions directly against attorneys for inappropriate behavior:

District Court	Local Rule No.	Sanction
1. Alaska	35D	Appropriate discipline, imposition of cost directly upon attorney at fault.
2. S.D. Cal.	28	Costs and other appropriate discipline directly to attorney.
3. C.D. Cal.	3K & 28A	Costs and other appropriate discipline directly to lawyer.
4. Idaho	23	Possible suspension, or costs assessed directly against attorney.
5. E.D. Mich.	XXVII(b)	Costs and other appropriate discipline assessed directly against attorney.
6. M.D. Pa.	101.18	Costs to the attorney at fault; possible suspension for up to six months.
7. W.D. Wash.	G.R. 3(d)	Costs to attorney, other appropriate discipline directly to attorney.

It appears that a judge of the Southern District of New York imposed costs on a frivolous motion without the benefit of a rule. 65 A.B.A.J. 892 (1972).

437. Interference with the assignment of a judge to a case or simply seeking to learn the assignment sequence will subject a lawyer to possible contempt proceedings in the district courts of N.D. Ill. (Rule 2.02 B) or Nebraska (Rule 11 I).

438. The following district court local rules provide sanctions against frivolous or unnecessary motions (but do not impose penalties directly on attorneys, as in note 436 above).

District Court	Local Rule No.	Sanction
1. Alaska	51	Imposition of costs and attorneys' fees on offender.
2. C.D. Cal.	3i	Imposition of costs, attorneys' fees, or other appropriate discipline on offender.
3. Idaho	4(g)	Appropriate discipline.
4. N.D. and S.D. Iowa	16(g)	Appropriate sanction, including costs and attorneys' fees to offender.
5. Kansas	15(d)	Appropriate discipline and imposition of costs on offender.

439. These district court local rules provide sanctions for delaying a trial:

District Court	Local Rule No.	Sanction
1. Alaska	4C	Offender must pay costs and jury fees.
2. C.D. Cal.	11	Offender must pay costs, attorneys' fees, and jury fees.
3. N.D. Cal.	250	Appropriate sanctions.
4. Idaho	9	Offender must pay jury fees.

District Court	Local Rule No.	Sanction
5. E.D. Ill.	13	Offender must reimburse other party for actual costs.
6. S.D. Ind.	18	Offender must reimburse other party for actual costs.
7. E.D. Mich.	XIII	Offender must pay jury fees and possibly other costs as well.
8. N.D. Miss.	C9	Offender must pay jury costs.
9. Mont.	19	Offender subjected to conditions and costs.
10. Oregon	27(b)	Offender subjected to conditions and must pay court and jury costs.
11. E.D. Pa.	16(c)	Offender will be justly disciplined.

440. Failure to File Trial Briefs

The following table lists which district courts provide for failure to file trial briefs and other necessary papers in their local rules:

District Court	Local Rule No.	Proposed Sanction
1. E.D. Cal.	107	Dropping case from trial calendar; costs, attorneys' fees to failing attorney; possible dismissal.
2. Conn.	11(f) and (g)	Put case at end of trial docket list; costs and fees to failing attorney.

District Court	Local Rule No.	Proposed Sanction
3. S.D. Fla.	14 H and K	Possible dismissal of case.
4. Idaho	11	Appropriate discipline.

441. Failure to Attend Pretrial Conferences

This table lists which district courts have sanctions in their local rules for not attending or preparing for pretrial conferences:

District Court	Local Rule No.	Possible Sanction
1. C.D. Cal.	28(b)	Default on specific issues or of case.
2. E.D. Cal.	104(d)	Possible dismissal.
3. Conn.	11(g)	Case put at end of trial list; cost and attorney's fees imposed.
4. D.C.	CR 1-15(c)	Default.
5. S.D. Fla.	14K	Appropriate discipline including dismissal.
6. S.D. Ind.	19 1	Appropriate sanction.
7. Maine	21(f)	Dismissal or exclusion of evidence at trial.
8. E.D. Mich.	XXVII(a)	Default.
9. N.D. Miss.	C-10(b)(3)	Appropriate sanction.
10. E.D.N.Y.	8	Impose fees, costs, fines.
11. M.D.N.C.	22M	Impose attorneys' fees.
12. W.D. Okla.	16 d	Default.
13. E.D. Okla.	16 d	Default.

District Court	Local Rule No.	Possible Sanction
14. Oregon	27 d	Default.
15. E.D. Pa.	16(c)	"Just discipline."
16. M.D. Pa.	101-18	Costs; default.
17. Puerto Rico	7	Default.
18. W.D. Tex.	18(b)	Dismissal of case or specific issue.
19. W.D. Wash.	R 3(c)	Default.

442. See local rules for Nevada, rule 13(a).

443. See local rules for E.D. Cal., rule 113(j) and rule 5.

444. Failure to File Memoranda on Motions
This table shows which district courts have local rules providing sanctions for failure to file memoranda on motions:

District Court	Local Rule No.	Possible Sanction
1. Alaska	5(B)(4)	Summary ruling against person not filing.
2. C.D. Cal.	3(e)(4)	A waiver of the motion is deemed by the court.
3. S.D. Cal.	220-9	Waiver deemed or judgment against party not filing without an examination of the record.
4. S.D. Fla.	10(c)	Motion is granted by default.
5. N.D. Fla.	7(b)	Motion granted by default.
6. Idaho	6(f)	Motion denied if counsel is not there to support it.
7. N.D. Ind.	7(b)	Summary ruling on the motion.

District Court	Local Rule No.	Possible Sanction
8. S.D. Ind.	8(a)	Summary ruling on the motion.
9. W.D. Ky.	7(a)	Grounds for sustaining motion.
10. E.D. La.	3.8	Delay until end of docket; deny oral argument.
11. M.D. La.	5(b)(3)	Summary ruling on the motion.
12. Nevada	16(e)	Constitutes consent to granting of motion.
13. N.H.	11(b)(1)	Deemed a waiver of any rights regarding the motion.
14. N.M.	9h	Deemed consent to motion.
15. S.D.N.Y.	9b	Possible summary ruling on motion against nonfiling party.
16. N.D.	VB	Summary ruling on the motion.
17. S.D. Ohio	3.5.2	Motion granted.
18. M.D. Pa.	301.01(e)	Deemed not to oppose motion.
19. Puerto Rico	8L	Deemed a waiver.
20. R.I.	12(a)(2)	Order motion unopposed and assess attorneys' fees and reasonable expenses against nonfiling party.
21. Vermont	9	Motion will be deemed unopposed.

District Court	Local Rule No.	Possible Sanction
22. E.D. Va.	11(Q)	Attorneys' fees imposed on offender and possible dismissal or default.
23. E.D. Wash.	11(i)	Entry of an order adverse to the failing party.
24. W.D. Wash.	7(B)(3)	Deemed that the motion or opposition to the motion, as the case may be, is without merit.
25. E.D. Wis.	6.01	Denial of the motion as a matter of course or a waiver of the right to oppose the motion is deemed.

445. Class Actions

The following table lists which district courts have provisions in their local rules calling for a determination of class action certification under Fed. R. Civ. P. 23(c)(1):

District Court	Local Rule No.	Time Allowed for Motion
1. E.D. Cal.	124 2(c)	120 days
2. D.C.	1-13(b)	90 days
3. S.D. Fla.	19(3)	90 days
4. M.D. Fla.	4.04(b)	90 days
5. N.D. Ga.	221.13	90 days
6. S.D. Ga.	14.13	90 days
7. S.D. Ind.	7(b)	90 days
8. E.D. La.	2.12(c)	90 days
9. N.D. Miss.	C-7	60 days
10. S.D. Miss.	18	45 days
11. S.D.N.Y.	C-11 A	60 days
12. S.D. Ohio	3.9.3	90 days
13. Oregon	17(c)	60 days
14. E.D. Penn.	45(c)	90 days
15. R.I.	30(c)	60 days
16. M.D. Tenn.	14(3)	60 days
17. N.D. Tex.	10.2(b)	90 days
18. Vermont	11	90 days
19. E.D. Wash.	7(3)	90 days
20. W.D. Wash.	CR23(3)	90 days

446. Annot., 15 A.L.R. 3d 674, 677 (1967); Note, Federal Pre-trial Practice: A Study of Modification and Sanctions, supra note 107, at 342.

447. Note, Federal Pre-trial Practice: A Study of Modification and Sanctions, supra note 107, at 342. See also Vestal, The Pretrial Conference and the Recalcitrant Attorney, A Study in Judicial Power, 48 Iowa L. Rev. 761, 775 (1963).

448. Comment, supra note 5, at 291; Renfrew, supra note 2, at 273.

449. 370 U.S. 626 (1962).

450. Id. at 629.

451. Gold, supra note 15, at 85. See generally Comment, supra note 287; Note, supra note 155, at 161.

The Link holding has been read to imply that little weight is to be given the fact "that the plaintiff himself has been free from neglect . . . if his attorney ha[d] inexcusably failed to prosecute his case in a diligent manner." Comment, supra note 180, at 927. The case also has been cited as supporting the conclusion that under such circumstances, dismissal is not a harsh penalty nor is its imposition an abuse of discretion on the part of the judge. See Note, supra note 155, at 158-59; Comment, supra note 287, at 187-89.

452. 370 U.S. at 633-34 (footnote omitted).

453. 370 U.S. at 634 n.10.

454. Id.

455. 370 U.S. at 648 (Black, J., dissenting).

456. Di Gregorio v. First Rediscount Corp., 506 F.2d 781 (3d Cir. 1974). See also King v. Mordowanec, 46 F.R.D. 474 (D.R.I. 1969) (in which the court announced that it would henceforth notify clients of their lawyers' dilatoriness).

457. Comment, supra note 180, at 929.

458. Note, Federal Pre-trial Practice: A Study of Modification and Sanctions, supra note 107, at 342-43.

459. Comment, supra note 180, at 930.

460. Note, Federal Pre-trial Practice: A Study of Modification and Sanctions, supra note 107, at 342.

461. Comment, supra note 180, at 930-31. A general discus-

sion of the malpractice remedy is of course beyond the scope of this report.

462. *Id.* at 930.

463. *Id.* at 932.

464. *Id.*

465. Vestal, *supra* note 447, at 762.

466. *Supra* note 155, at 162.

Courts occasionally rely on their inherent power to impose sanctions. This power has been termed "nebulous" and "shadowy" but is generally defined as the power of courts to run their business and exercise their jurisdiction in an orderly and efficient manner. Federal courts have employed this power in procedural situations not covered by the federal rules. *See* Rosenberg, *supra* note 3, at 485; Comment, *supra* note 17, at 283-84; Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. Chi. L. Rev. 619, 633 (1977); McIlvaine, *supra* note 15, at 409; *Recent Decisions*, 62 Colum. L. Rev. 187, 189 (1962).

Inherent powers do not derive from any express constitutional provision or legislative enactment. The authority springs from "the very nature of the court's organization and is essential to its existence, protection, and due administration." *Supra* note 155, at 162. However, this inherent power of the federal courts is subject to limitations imposed by the legislature, because the courts derive their existence and power from Congress. Some state courts, on the other hand, hold that their inherent powers cannot be legislatively circumscribed. *Recent Decisions*, *supra*.

The following are examples of the exercise by courts of inherent power over attorneys:

(a) determining the qualifications necessary for admission to practice before it;

(b) eliminating champertous causes of action from their calendars;

(c) suspending or disbarring lawyers from practicing;

(d) ordering an attorney to fulfill his agreement to represent a party; and

(e) in criminal cases, appointing an attorney. *Supra* note 155, at 162-63.

The Supreme Court has recently given new recognition to this power, and suggested that invoking it may sometimes be preferable to imposing sanctions on the client. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

467. *In re* Sutter, 543 F.2d 1030 (2d Cir. 1976); Flaska v. Little River Marine Construction Co., 389 F.2d 885, 888 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968); McIlvaine, *supra* note

15, at 409; Renfrew, *supra* note 2, at 268. For a discussion of case law on this point, see Comment, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. Rev. 855, 876-78 (1979).

When a lawyer breaches his obligation to cooperate, he delays the litigation process and adds to the congestion of the court system. On that basis sanctions to regulate attorney action have been justified. "Since a high degree of cooperation between the bench and the bar, not between the bench and the parties, is the essence of an effective pre-trial system, the imposition of penalties upon the lawyer, who was responsible for the infraction of the rules, seems to be quite logical." Note, *Federal Pre-trial Practice: A Study of Modification and Sanctions*, *supra* note 107, at 343. *See also* Note, *supra* note 155, at 158; Note, *supra* note 466, at 619.

468. *See generally* McIlvaine, *supra* note 15, at 409.

469. Note, *supra* note 466, at 619.

470. 18 U.S.C. § 401 (1970) provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The statute is supplemented by Fed. R. Crim. P. 42, which provides procedural safeguards:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
>
> (b) Disposition upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involved

disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The contempt statute has two features limiting a court's power to punish under it. The first feature is that the statute has a very restrictive mens rea requirement: A contemner must have willfully disregarded the authority of the court. Unless this requirement is met, the Supreme Court held in *In re McConnell*, 370 U.S. 230 (1962), a federal court cannot punish the conduct as contemptuous. The second feature of the contempt sanction is the traditional distinction, embodied in the above provision of criminal rule 42, between direct and indirect contempt. "While a direct contempt can be punished summarily, an indirect contempt cannot be punished without a full trial. . . . The determination of whether a contempt is direct or indirect turns on whether it is committed in the 'immediate view and presence of the court'." Therefore, "the disobedience of a judicial order to be performed outside the court," such as a discovery order, will be characterized as indirect contempt and punishable only after a full trial. The direct-indirect distinction and the mens rea requirement suggest that contempt is inadequate to regulate the full gamut of misconduct. *See* Note, *supra* note 466, at 620, 622-23.

471. Vestal, *supra* note 447, at 777.

472. *Id.*; Comment, *supra* note 467, at 861-63.

473. Note, *supra* note 466, at 635.

The district courts' inherent authority includes the power to promulgate rules which govern their proceedings. Heckers v. Fowler, 69 U.S. (2 Wall) 123, 128 (1865). This inherent power to fashion local rules has been codified in 28 U.S.C. § 2071 and rule 83 of the Federal Rules of Civil Procedure. The district courts are given the authority to promulgate rules covering areas not expressly covered by the federal rules. Rule 83 imposes only one express limitation on this power: The rules must be consistent with the federal rules. Federal statute 28 U.S.C. § 2071 imposes an additional limitation that no local rule conflict with any other federal statute.

An advantage of the local rule-making power is its great latitude in specifying the type of misconduct which warrants a penalty. Therefore, local rules can provide for the imposition of sanctions when conduct is either reckless or negligent. Note, *Federal Pre-trial Practice: A Study of Modification and Sanctions*, *supra* note 107, at 331; Note, *supra* note 466, at 636.

474. Note, *supra* note 466, at 635.

475. *Id.*

476. 307 F.2d 729 (3d Cir. 1962), cert. denied sub nom. United States District Court v. Mahoney, 371 U.S. 888 (1962).

477. Id. at 731.

The Second Circuit has rejected the Gamble holding and the Gamble decision has suffered much criticism. UCLA Comment, supra note 467, at 875 n.131.

478. 28 U.S.C. § 1927 (1948) provides as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

This statute is the subject of an annotation in 12 A.L.R. Fed. 910 (1972).

479. Supra note 155, at 169.

The Advisory Committee on Civil Rules of the United States Judicial Conference and the Special Committee for the Study of Discovery Abuse of the ABA Section of Litigation have proposed an expansion of federal rule 37. See discussion at note 116 supra. In 1978 they each proposed a new federal rule 37(e) which was to make explicit reference to 28 U.S.C. § 1927. The reference apparently was designed to encourage district courts to use that sanction when appropriate.

The Advisory Committee issued a revised draft in 1979. Revised Preliminary Draft, supra note 2. The revised draft eliminates all reference to 28 U.S.C. § 1927. "Presumably Section 1927 sanctions are available, but the failure to provide an express reference in Rule 37 will make its use less likely." Cohn, supra note 2, at 294.

480. Motion Picture Patents Co. v. Steiner, 201 F.2d 73 (2d Cir. 1912).

481. Note, supra note 466, at 624.

482. Id. at 625.

483. Supra note 155, at 168-69, citing Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 F.2d 350 (6th Cir. 1915); Bardin v. Mondon, 298 F.2d 235 (2d Cir. 1961).

Other cases invoking § 1927 include Acevedo v. INS, 538 F.2d 918 (2d Cir. 1976) (filing frivolous petition for review of deportation order merely to delay deportation); Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968) (causing second trial by misconduct at first one), cert. denied, 395 U.S. 908 (1969); Monk v. Roadway Express, Inc., 73 F.R.D. 411 (W.D. La. 1977) (filing extensive civil rights class action and apparently taking no further interest in it), modified, 599 F.2d 1378

(5th Cir. 1979), *cert. granted*, 444 U.S. 1012, 100 S. Ct. 659 (1980).

484. United States v. Ross, 535 F.2d 346 (6th Cir. 1976); Note, *supra* note 155, at 169. *Cf*. Meitzner v. Mindick, 549 F.2d 775 (Ct. Cust. & Pat. App.), *cert. denied*, 434 U.S. 854 (1977).

485. Note, *supra* note 466, at 626.

486. *Id*. *See* West Virginia v. Charles Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). In Weiss v. United States, 227 F.2d 72 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956), the court warned counsel that an attempt to reopen the case would subject him to costs under § 1927.

487. *Supra* note 155, at 166.

488. *Id*.

489. *Id*. at 168; Note, *supra* note 466, at 628-29.

490. 1507 Corp. v. Henderson, 447 F.2d 540 (7th Cir. 1971); United States v. Ross, 535 F.2d 346 (6th Cir. 1976); *In re* Realty Associates Sec. Corp., 53 F. Supp. 1013 (E.D.N.Y. 1943).

491. 1507 Corp. v. Henderson, 447 F.2d 540 (7th Cir. 1971).

492. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). This would seem to reject the holding of Acevedo v. Immigration and Nat. Serv., 538 F.2d 918 (2d Cir. 1976) that where a statute provides for double costs these can be imposed on an attorney under § 1927.

493. Note, *supra* note 466, at 628-29.

494. Harrell v. Joffrion, 73 F.R.D. 267 (W.D. La. 1976).

495. United States v. Ross, 535 F.2d 346 (6th Cir. 1976).

496. Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965) (attorneys not liable for expenses where No. 37(a) motion made); Barter v. Eastern S.S. Lines, 1 F.R.D. 65 (S.D.N.Y. 1939) (attorney not liable where advice given in good faith). *See also* Humphreys Exterminating Co. v. Poulter, 62 F.R.D. 392 (D. Md. 1974), comparing pre-1970 and post-1970 standards.

497. Shapiro v. Freeman, 38 F.R.D. 308 (S.D.N.Y. 1965).

498. *Id*.; Braziller v. Lind, 32 F.R.D. 367 (S.D.N.Y. 1963).

499. Ogletree v. Keebler Co., 78 F.R.D. 661 (N.D. Ga. 1978); Szilvassy v. United States, 71 F.R.D. 589 (S.D.N.Y. 1976).

500. Stanziale v. First Nat'l City Bank, 74 F.R.D. 557 (S.D.N.Y. 1977).

501. Associated Radio Service Co. v. Page Airways, Inc., 73 F.R.D. 633 (N.D. Tex. 1977).

502. *Id.*; Szilvassy v. United States, 71 F.R.D. 589 (S.D.N.Y. 1976); Stanziale v. First Nat'l City Bank, 74 F.R.D. 557 (S.D.N.Y. 1977). *Szilvassy* indicates that if the plaintiff had been to blame rather than his lawyer the court would have dismissed the case instead of merely imposing expenses. To similar effect, *see* Austin Theatre, Inc. v. Warner Bros. Pictures, Inc., 22 F.R.D. 302 (S.D.N.Y. 1958).

503. Humphreys Exterminating Co. v. Poulter, 62 F.R.D. 392 (D. Md. 1974). *Cf.* EEOC v. Los Alamos Constructors, Inc., 382 F. Supp. 1373 (D.N.M. 1974) (imposing expenses on government attorneys personally would be unjust in this particular case, although, but for rule 37(f), imposing them on government would be appropriate).

504. Braziller v. Lind, 32 F.R.D. 367 (S.D.N.Y. 1963); Shapiro v. Freeman, 38 F.R.D. 308 (S.D.N.Y. 1965).

505. Note, *supra* note 466, at 636.

506. Spering v. Sullivan, 361 F. Supp. 282 (D. Del. 1973).

507. Note, *supra* note 466, at 639. *Cf.* Sperberg v. Firestone Tire & Rubber Co., 61 F.R.D. 78 (N.D. Ohio 1973) (in which conduct does not amount to contempt; aggrieved party's remedy is with local bar association).

508. Vestal, *supra* note 447, at 778.

509. For parallel problems in the criminal procedure area, *see* Note, *The Preclusion Sanction--A Violation of the Constitutional Right to Present a Defense*, 81 Yale L.J. 1342 (1972).

510. 167 U.S. 409 (1897). The principal holdings discussed in the text are reviewed throughout the literature. *See, e.g.*, Comment, *supra* note 5, at 287, 288; Comment, *supra* note 17, at 250, 251; Annot. 99 L. Ed. 54 (1950); Annot. 144 A.L.R. 372 (1943); Annot. 6 A.L.R. 3d 713 (1966); Note, *The Constitutional Limits of Discovery*, 35 Ind. L.J. 337 (1960).

511. 212 U.S. 322 (1909).

512. *Id.* at 350-51.

513. *Id.* at 351.

514. Id.

515. 357 U.S. 197 (1958).

516. Id. at 212. The court's adherence in Rogers to the "presumption" rationale does not provide, of course, any guidance on the imposition of less severe sanctions. Supra note 17, at 252.

517. 357 U.S. at 208.

518. Id. at 212.

519. 8 Wright & Miller, Federal Practice and Procedure: Civil § 2283, at 762 (1970).

520. Comment, supra note 5, at 287.

521. Supra note 384, at 841-42.

522. Supra note 17, at 260.

523. 4A Moore's Federal Practice ¶ 37.03[2.-1], at 37-56 (2d ed. 1948).

524. Developments in the Law--Discovery, supra note 3, at 990.

525. 427 U.S. 639 (1976).

526. Id. at 640.

527. Id. at 643.

528. 4A Moore's Federal Practice ¶ 37.03[2.-1], at 37-55, 37-56 (2d ed. 1948).

529. Id.

530. 4A Moore's Federal Practice ¶ 37.03[2.-1], at 37-56 (2d ed. 1948) (footnote citing illustrative lower court cases omitted). This interpretation is approved in Brown, Proposed Changes to Rule 33 Interrogatories and Rule 37 Sanctions, 11 Ariz. L. Rev. 443, 452 (1969). One author reads the original advisory committee's notes discussing the Hovey and Hammond cases as taking the view that "the availability of the sanctions of dismissal or default judgment is a reasonable means of securing the production of material evidence by discovery, and therefore consistent with due process." Developments in the Law--Discovery, supra note 3, at 990.

531. Developments in the Law--Discovery, supra note 3, at 990.

532. See notes 494-95 and accompanying text supra.

533. Shapiro v. Freeman, 38 F.R.D. 308 (S.D.N.Y. 1965).

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531. *Developments in the Law—Discovery*, supra, note 3, at 970.

532. See notes [illegible] and accompanying text supra.

533. Shapiro v. Freeman, 38 F.R.D. 308 (S.D.N.Y. 1965).

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